

. . . AND JUSTICE FOR ALL: TOWARDS A STANDARD APPROACH FOR RESOLVING FAULTY SPD CASES

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I. INTRODUCTION

In 1974, after a decade of debate and work,¹ the United States Congress enacted the Employee Retirement Income Security Act (ERISA).² One purpose of this legislation is to “protect . . . the interests of participants in employee benefit plans . . . by requiring the disclosure and reporting . . . of financial and other information with respect thereto”³ ERISA marked its twenty-fifth anniversary in 1999, engendering a great deal of reflection on this landmark legislation from scholars and commentators.⁴

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1. Michael S. Gordon, *Twenty-Fifth Anniversary Reflections on ERISA*, 15 EMP. BENEFITS Q. 6, 8-14 (4th Q. 1999) (describing the legislative history behind ERISA’s enactment).

2. 29 U.S.C. §§ 1001-1461 (2000), ERISA §§ 1-4402. This paper will provide parallel citations to ERISA and the U.S. Code.

3. 29 U.S.C. § 1001(a), ERISA § 2(b).

4. See generally Sue Burzawa, *Through Federal Court Decisions, ERISA Takes*

Since 1974, the private pension and welfare⁵ benefit system has grown in economic and social stature and importance.⁶ Spending for health care in the United States reached \$1.2 trillion in 1999, more than double the number from 1988.⁷ Retirement, the Social Security system, and the stock market invite universal comment from lay people to the President of the United States.⁸ The role of

Shape, Evolves to Meet Issues of Changing Workforce, 54 EMPLOYEE BENEFIT PLAN REV. 48, 48-50, 52-53 (Sept. 1999) (collecting benefit attorneys' reflections on ERISA); Gordon, *supra* note 1 (discussing ERISA's enactment and accomplishments); Samuel L. Halpern, *My Perspective on ERISA*, 15 EMP. BENEFITS Q. 63, 63-65 (4th Q. 1999) (discussing ERISA's application to public and national retirement systems); Dorothy Sanders Wells, *ERISA, 25 Years Later: The Evolution of America's Employee Benefits Policy*, 36 JAN TENN. B.J. 31, 31-36 (2000) (comparing the state of employee benefits in America in 1999 and 1974); .

5. For the purpose of this paper, pension plans are those plans defined in 29 U.S.C. § 1002(2)(A) (ERISA § 3(2)(A)):

'[E]mployee pension benefit plan' and 'pension plan' mean any plan, fund, or program...that by its express terms or as a result of surrounding circumstances... (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. . . .

29 U.S.C. § 1002(2)(A) (ERISA § 3(2)(A)). Such plans include defined benefit pension plans, 401(k) plans, money purchase pension plans, and others. *See also* 26 U.S.C. §§ 401(a), 401(k) (2000). Welfare plans are defined in 29 U.S.C. § 1002(1) (ERISA § 3(1)):

[A plan maintained] for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services. . . .

29 U.S.C. § 1002(1), ERISA § 3(1).

6. *E.g.*, U.S. DEPARTMENT OF LABOR, 1995 PRIVATE PENSION BULLETIN, Tables E8, E11 *available at* http://www.dol.gov/dol/pwba/public/program/opr/bullet1995/e_8.htm, http://www.dol.gov/dol/pwba/public/programs/opr/bullet1995/e_11.htm (last visited Aug. 25, 2001) (showing that total pension plan assets grew from \$259,963,000 in 1975 to \$2,723,735,000 in 1995 while total active participants grew from 38,431,000 to 66,193,000).

7. Stephen Heffler et al., *Health Spending Growth Up in 1999; Faster Growth Expected in the Future*, 20 HEALTH AFFAIRS 193, 194 (2001).

8. *See generally* Press Release, The White House Office of the Press Secretary, Remarks by the President in Social Security Announcement (May 2, 2001), *available at* <http://csss.gov/press/press050201.html> (last visited Aug. 23, 2001) (observing that Social Security is the greatest achievement of the American government but it is imperiled and we must act now to save it); Stacy Forster, *Gen Xers to Get Help Preparing for Retirement*, WALL ST. J., May 1, 2000, at B3A (discussing

the private pension and welfare benefit system is critical to the health and well being of this nation's employees and retirees.⁹ ERISA recognizes the role of the private benefit system and attempts to standardize its regulation and operation by preempting state law¹⁰ and giving federal courts primary jurisdiction over ERISA's civil enforcement provisions.¹¹

In enacting ERISA, Congress struck a balance between government-mandated pension and welfare benefits and the relatively unregulated state of the industry . Without mandating that private employers adopt pension and welfare benefit plans, the government sought to protect the interests of plan participants and beneficiaries in benefits that they relied on for their very health and well-being.¹² Reasoning that informed participants are more likely to understand their plans and safeguard their own interests,¹³ ERISA requires a plan sponsor to furnish a summary plan description (SPD) for each employee benefit plan it sponsors.¹⁴ The SPD must set forth certain minimum information, including a description of benefit calculations and when participants might forfeit benefits.¹⁵ When the SPD is faulty, incomplete, or conflicts

the awareness of younger workers of the need to prepare for retirement); Glen Ruffenach, *Fewer Americans Save for their Retirement: Market, Health-Care Worries Take Toll on Attitudes for Future, Survey Finds*, WALL ST. J., May 10, 2001, at A2 (reporting poll results about standards of living in retirement, the future of Medicare, and ignorance about delayed Social Security Normal Retirement Age).

9. 29 U.S.C. § 1001(a), ERISA § 1(a) (“[T]he continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans.”).

10. 29 U.S.C. § 1144(a), ERISA § 514(a).

11. 29 U.S.C. § 1132(e), ERISA § 502(e). District courts have exclusive jurisdiction over civil actions brought under 29 U.S.C. § 1132(a)(1)(A) (ERISA § 502 (a)(1)(A)) (refusal of a plan administrator to provide requested information), §1132(a)(2)-(6) (ERISA § 502 (a)(2)-(6)) (breach of fiduciary duty claims, claims for equitable relief, failure to provide annual individual benefit statement, Secretary of Labor power to assess civil penalties). *Id.* State and district courts have concurrent jurisdiction to hear claims for benefits due from a plan under 29 U.S.C. §1132(a)(1)(B) (ERISA § 502(a)(1)(B)). *See also* EMP. BENEFITS LAW 925-26 (Steven J. Sacher et al. eds., 2d ed. 2000).

12. H.R. Rep. 93-533 at 2, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639-40; 29 U.S.C. § 1001(a), ERISA § 1(a).

13. H.R. Rep. 93-533 at 11, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649.

14. 29 U.S.C. § 1022(a), ERISA § 102(a).

15. 29 U.S.C. § 1022(b), ERISA § 102(b). This section requires the SPD to contain the following information:

The name and type of administration of the plan; in the case of a group health plan . . . whether a health insurance issuer . . . is responsible for the financing or administration . . . of the plan

with the actual plan, the participant may bring a civil suit against the plan sponsor for damages that follow from the failure to disclose plan terms.¹⁶

The federal circuit courts have split on the question of whether the participant must demonstrate some reliance on or prejudice from the faulty SPD before he is entitled to relief. The Sixth Circuit has explicitly held that no reliance is required, finding plan sponsors strictly liable for errors or inconsistencies in their SPDs.¹⁷ The First, Third, Fourth, Seventh, Eighth, Tenth and Eleventh Circuits have all held that a participant must demonstrate reliance on or prejudice flowing from the SPD in order to have an actionable claim.¹⁸ The Second, Fifth and Ninth Circuits have not definitively ruled on the issue but have noted the split.¹⁹

The first section of this paper briefly discusses pre-ERISA benefit disclosure obligations. The second section concentrates on the case law from each circuit. The third section discusses the specific standards of recovery that courts have used when a participant makes a benefit claim on the basis of a faulty SPD. The final section recommends a common standard of recovery for

and . . . the name and address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees . . . ; a description of the relevant provisions of any applicable collective bargaining agreements; the plan's requirements respecting eligibility for participation and benefits; *a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits*; the source of financing of the plan and the identity of any organization through which benefits are provided . . . and the remedies available under the plan for the redress of claims which are denied in whole or in part

Id. (emphasis added).

16. 29 U.S.C. § 1132(a)(1)(B), ERISA § 502(a)(1)(B). This section provides that a participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . ." *Id.*

17. *E.g.*, *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 137 (6th Cir. 1988).

18. *E.g.*, *Bachelor v. Communications Satellite Corp.*, 837 F.2d 519, 522-23 (1st Cir. 1988); *Pierce v. Sec. Trust Life Ins. Co.*, 979 F.2d 23, 24 (4th Cir. 1992); *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 984 (8th Cir. 1992).

19. *Layaou v. Xerox Corp.*, 238 F.3d 205, 212 (2d Cir. 2001); *Rhorer v. Raytheon Eng'rs & Constructors, Inc.*, 181 F.3d 634, 644 (5th Cir. 1999); *Adams v. J.C. Penney Co., Inc.*, 865 F.Supp. 1454, 1459 (D. Or. 1994).

faulty SPD cases. This approach is consistent with ERISA's purpose of standardizing federal benefits law for the benefit of a strong, nationwide private welfare and pension benefit system.

II. HISTORY OF BENEFIT DISCLOSURE OBLIGATIONS

Before ERISA, the most prominent legislation mandating benefit disclosure was the Welfare and Pension Plans Disclosure Act.²⁰ Enacted in August 1958, the Act contained precursors to ERISA disclosure obligations. For example, the Act required plan sponsors to provide each participant and beneficiary a description of the plan and an annual financial report.²¹ The plan description was not required to be as detailed as the ERISA SPD. Most notably, there was no requirement for a detailed explanation of the circumstances that could cause denial or loss of benefits.²² The annual report under the Act was more detailed than the plan description, requiring the plan administrator to publicize employer- and employee-contributed amounts, the plan's funding mechanism, a summary of assets and liabilities of the plan, actuarial assumptions for pension benefit plans, and insurance details.²³ By enacting ERISA Congress repealed the Welfare and Pension Plans Disclosure Act effective January 1, 1975.²⁴ Treasury Regulations also contained general pre-ERISA disclosure obligations, such as a requirement that the plan must be in writing and "communicated to participants."²⁵

20. Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (repealed 1974).

21. *Id.* at § 5(a), 72 Stat. at 999.

22. *Id.* at § 6(b), 72 Stat. at 999.

23. *Id.* at § 7(a)-(f), 72 Stat. at 1000-01.

24. 29 U.S.C. § 1031(a)(1), ERISA § 111(a)(1).

25. Treas. Reg. § 1.401-1(a)(2) (as amended in 2001). *See also* Leonard S. Hirsh, *Understanding ERISA 1994: An Introduction to Basic Employee Retirement Benefits*, in 355 PRACTISING LAW INST. 149, 149 (1994).

III. THE CIRCUIT SPLIT

A. *The Second, Fifth and Ninth Circuits – Holding the Issue in Reserve*1. *Layaou v. Xerox Corp.*

The Second Circuit Court of Appeals in *Layaou v. Xerox Corp.* identified the circuit split.²⁶ In *Layaou*, the court reviewed Western District of New York’s grant of summary judgment for Xerox.²⁷ John Layaou worked for Xerox from 1972–1983.²⁸ In 1983, he left voluntarily while Xerox was experiencing a period of layoffs.²⁹ When he left, Xerox distributed his vested pension benefit to him in the form of a lump sum.³⁰ In September 1987, Layaou returned to work at Xerox, where he remained until January 1994, when Xerox laid him off.³¹

Each year Xerox provided Layaou with an SPD to satisfy its disclosure obligations under ERISA.³² In addition, Xerox provided Layaou with a calculation and summary of his benefits.³³ The 1994 summary estimated his pension benefit at \$924.00 per month.³⁴ The summary noted that Layaou’s benefit could be reduced if he received benefits from another Xerox retirement plan.³⁵

Following Layaou’s second period of employment, Xerox’s retirement plan administrator calculated his pension benefit by evaluating his service and pay under three different formulas.³⁶

26. 238 F.3d 205, 212 (2d Cir. 2001).

27. 69 F.Supp 2d 419, 428 (W.D.N.Y. 1999).

28. 238 F.3d at 206.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 206-07. 29 U.S.C. § 1024(b)(1)(B), ERISA § 104(b)(1)(B) requires plan administrators to furnish SPDs within ninety days of a participant’s date of participation and every five years thereafter. Many employers, however, choose to update their SPDs more frequently than ERISA requires, in an effort to keep participants updated on the terms and conditions of the plan.

33. 238 F.3d at 207.

34. *Id.*

35. *Id.*

36. *Id.* at 206. The first formula, Retirement Income Guarantee Plan, is a final average pay formula that expresses a participant’s benefit as a monthly annuity. *Id.* The second formula, Cash Balance Retirement Account, is an individual account feature with annual pay and periodic interest credits “deposited” by Xerox. *Id.* The final formula, Transitional Retirement Account,

The most generous benefit of the three was the Cash Balance Retirement Account.³⁷ To calculate Layaou's ultimate benefit, the plan administrator offset his Cash Balance Retirement Account benefit by the appreciated value of the previous lump sum distribution he had received after his first period of employment.³⁸ This resulted in a monthly benefit of \$145, "significantly smaller than. . . [the amount] set forth in Xerox's 1994 yearly estimate of benefits for Layaou."³⁹

Layaou filed a claim for additional benefits, contesting the offset the plan administrator performed using the appreciated value of his prior lump sum distribution.⁴⁰ The plan administrator denied his claim and subsequent plan-level appeal,⁴¹ so Layaou filed suit in federal court.⁴² The district court determined that because the SPD stated that Layaou's benefit "[m]ay also be reduced if [he] had previously left the Company and received a distribution at that time," it did not conflict with the terms of the plan, which enumerated the offset method using the appreciated value of the prior lump sum distribution.⁴³ For this reason, the

contained Layaou's transferred balance from a discontinued profit sharing plan, brought forward with investment results. *Id.*

37. *Id.* at 207.

38. *Id.* at 208.

39. 238 F.3d at 208.

40. *Id.*

41. *Id.* ERISA requires plan administrators to set out a claims process for the resolution of benefit disputes. 29 U.S.C. § 1133, ERISA § 503. The plan must provide a written notice to a participant whose claim for benefits has been denied. *Id.* The participant must also have the right to appeal a benefit denial. 29 U.S.C. § 1133(1), ERISA § 503(1). If the participant appeals the denial of his claim, the plan must provide for a "full and fair review" by the named plan fiduciary who denied the claim. 29 U.S.C. § 1133(2), ERISA § 503(2). The participant generally may not bring suit in federal court until the full claim and appeals process has been exhausted. Andrew M. Campbell, Annotation, *Exhaustion of Administrative Remedies as Prerequisite to Suit Under Employee Retirement Income Security Act of 1974*, 162 A.L.R. FED. 1 (2000).

42. 239 F.3d at 208.

43. 69 F.Supp 2d 419, 426 (W.D.N.Y. 1999). Generally, when an SPD and plan document conflict, the participant's benefit should be determined by the SPD. *Heidgerd v. Olin Corp.*, 906 F.2d 903, 908 (2d Cir. 1990). The essence of Layaou's claim was that because the SPD does not fully disclose the offset method of determining benefits (reduce the current accrued benefit by the appreciated value of the prior lump sum distribution), his benefits must be determined without this offset, although the plan document requires it. Courts have been willing to find that the SPD controls the terms of the plan where the two documents conflict: "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."

district court entered summary judgment for Xerox.⁴⁴

On appeal, the Second Circuit reversed.⁴⁵ It found that the brief sentence stating that Layaou's benefits *might* be reduced was insufficient notice of the offset provision.⁴⁶ It went on, however, to state that on remand, the district court must decide whether Layaou must demonstrate reliance on or prejudice from the SPD in order to recover.⁴⁷

2. *The Second Circuit District Court Decisions*

The Second Circuit has not decided the reliance or prejudice issue.⁴⁸ Several district courts have faced the issue squarely and come to inconsistent results. In *Ritzer v. National Organization of Industrial Trade Unions Insurance Trust Fund*, the court held that a plaintiff must show a "high probability of prejudice" from a faulty SPD.⁴⁹ In *Ritzer*, the plaintiff's decedent underwent hip replacement surgery.⁵⁰ Based on an undisclosed "*in terrorem*" clause in the plan rules, the fund denied his hospital benefits.⁵¹ Before the dispute was resolved, he died. In its holding, the Eastern District of New York stated that to require a showing of actual reliance would work an "insurmountable hardship" on many plaintiffs, including the estate of the decedent.⁵² In addition, an actual reliance rule would "virtually . . . immunize the ERISA plan from liability."⁵³ For that reason, a showing of possible prejudice, a

McKnight v. S. Life & Health Ins. Co., 758 F.2d 1566, 1570 (11th Cir. 1985).

44. 69 F.Supp 2d at 428.

45. 238 F.3d at 213.

46. *Id.* at 211.

47. *Id.* at 212. Layaou provided an affidavit that stated that he "read and relied upon the faulty SPD" and his annual benefit calculation. *Id.* On remand, the district court must determine if the affidavit is sufficient to withstand summary judgment. *Id.*

48. *Id.*

49. 822 F.Supp. 951, 955 (E.D.N.Y. 1993).

50. 807 F.Supp. 257, 259 (E.D.N.Y. 1992).

51. *Id.* The "*in terrorem*" clause in this case allowed the Fund to terminate coverage for an employer group if the employer failed to insure an eligible employee, or if the employer insured an ineligible employee. *Id.* at 261. The court noted that the effect of this rule was to enable the plan to deny all pending claims, even those of eligible employees, based on circumstances "entirely beyond [the employees'] knowledge and control." *Id.*

52. 822 F.Supp. 951, 955. The court also noted that "a person is likely to incur substantial medical expense when dying, or, as here, in the year or two before dying." *Id.*

53. *Id.*

lighter burden, is sufficient⁵⁴

By contrast, in *Moriarty v. United Technologies Corp. Represented Employees Retirement Plan*, the court found, despite an unquestionably faulty SPD and an arbitrary and capricious denial of benefits, that the plaintiff was not entitled to recover disability pension benefits.⁵⁵ The defendant's pension plan provided for disability benefits upon permanent and total disability to participants who received Social Security disability approvals.⁵⁶ Under the plan document, a person ceased to be a participant when his employment ended.⁵⁷ The SPD contained no such definition of "participant," so Moriarty claimed that although his Social Security disability approval occurred following his termination of employment, he still should be considered a participant and entitled to receive a disability pension under the plan.⁵⁸

The court granted summary judgment to the defendant.⁵⁹ It first found that the SPD lacked a definition of participant, thereby failing to "inform employees of the 'circumstances which may result in disqualification, ineligibility, or loss of benefits.'"⁶⁰ The contradictory SPD thus is the controlling document to determine the participant's right to benefits under the plan.⁶¹ The court next found that the plan's denial of benefits was arbitrary and capricious, because the SPD failed to disclose that the Social Security determination must be made while the participant was still employed.⁶²

54. *Id.* Possible prejudice allowed the court to infer injury to Ritzer due to the undisclosed *in terrorem* rule. *Id.* at 956. The court opined that had the rule been disclosed, even if Ritzer never read the SPD, he may have learned of it from other employees. *Id.* at 955. Furthermore, his employer would have known about the rule and presumably been more likely to try to avoid violating it. *Id.*

55. 947 F.Supp. 43, 52 (D. Conn. 1996), *aff'd on other grounds*, 158 F.3d 157 (2d Cir. 1998).

56. 947 F.Supp. at 47.

57. *Id.*

58. *Id.* at 47, 50.

59. *Id.* at 53.

60. *Id.* at 51, quoting 29 U.S.C. § 1022(b), ERISA § 102(b).

61. *Id.* at 51-52. *See also supra* note 43.

62. 947 F.Supp. at 52. 29 U.S.C. § 1132(a)(1) does not contain a standard of review to which plan administrators are held when they are considering benefit claims. The United States Supreme Court held in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 102 (1989), that the plan administrator's decision to deny benefits must be reviewed *de novo* unless the plan document "expressly gives the plan administrator . . . discretionary authority to determine eligibility for benefits or to construe the plan's terms, in which case a deferential standard of review is

Even with these findings, the court denied relief to the plaintiff, finding that “[m]ost courts that have considered the issue have held that the employer must have acted in bad faith, actively concealed the benefit plan, or otherwise prejudiced their employees by inducing their reliance on a faulty plan summary before recovery for procedural violations is warranted.”⁶³ The plaintiff failed to allege or provide any evidence of detrimental reliance and indeed admitted that he did not read the SPD.⁶⁴ The court observed that “[w]ithout having read [it], Plaintiff could not have relied on it or been prejudiced or misled by its contents.”⁶⁵

The *Moriarty* court thus failed to distinguish between possible prejudice and actual reliance. *Moriarty* seems to require reliance: the court wanted the plaintiff to allege that he had *read* the SPD and suffered as a result. As the *Ritzer* court observed, reliance and prejudice can be quite different things. One possible explanation for this divergence is that *Moriarty*, still alive, has the capability to allege and prove reliance, if he in fact experienced it. *Ritzer*’s estate, liable for his unpaid medical bills, has no such ability.

The final reliance case in the Second Circuit is *Manginaro v. Welfare Fund of Local 771*.⁶⁶ The Southern District of New York adopted the middle ground: it granted summary judgment to the plaintiff upon a “showing either of detrimental reliance upon, or possible prejudice flowing from, a faulty SPD. . . .”⁶⁷

Manginaro concerned the proper statute of limitations applicable to the participant’s claim. The beneficiary in *Manginaro*, the son of the Fund’s participant, was severely burned at the age of eight in a toy store fire.⁶⁸ As a result of the accident, the beneficiary needed constant nursing care.⁶⁹ The plan’s medical insurer changed and the new insurance company denied coverage for nursing expenses that the plan had previously paid.⁷⁰ After

appropriate.” *Id.* When the deferential standard of review is proper, courts will not “disturb the administrator’s ultimate conclusion unless it is arbitrary and capricious.” 947 F.Supp. at 50 (quoting *Pagan v. Nynex Pension Plan*, 52 F.3d 438, 441 (2d Cir. 1995)).

63. 947 F.Supp. at 52 (quoting *Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 743 (7th Cir. 1991)).

64. *Id.* at 53.

65. *Id.*

66. 21 F.Supp 2d 284 (S.D.N.Y. 1998).

67. *Id.* at 296.

68. *Id.* at 289.

69. *Id.*

70. *Id.*

exhausting administrative remedies, the plaintiff filed suit, seeking plan benefits under 29 U.S.C. § 1132(a)(1)(B).⁷¹ ERISA does not provide a statute of limitations for § 1132(a)(1)(B) actions, so courts look to the most similar state statute of limitations.⁷²

In *Manginaro*, however, the plan document set forth a two-year statute of limitations.⁷³ The SPD contained no such disclosure.⁷⁴ Because the SPD and plan document conflicted, the SPD controlled and the court applied the six-year New York state statute of limitations on contract actions.⁷⁵ The district court determined that the plaintiffs were “likely prejudiced by the SPD’s failure to disclose the limitations on actions contained in the Plan.”⁷⁶ Prejudice here seems to mean loss of a benefit, to which the plaintiff would have otherwise been entitled, due to a limitation that was omitted from the SPD. In making its conclusion of “likely prejudice,” the court mused that had the SPD contained the important two-year limitation, the plaintiff would likely have heard about it from his employer, co-workers, or even the union, even if the plaintiff did not read the SPD.⁷⁷

3. *The Fifth Circuit*

The Fifth Circuit Court of Appeals has expressly considered the reliance issue three times, and each time it has decided not to decide the issue.

a. *Hansen v. Continental Insurance Co., 940 F.2d 971 (5th Cir. 1991).*

In *Hansen*, the plaintiff’s wife passed away after an automobile accident.⁷⁸ The plaintiff had covered his wife under an accidental

71. *Id.* at 292.

72. 21 F.Supp 2d at 293.

73. *Id.* The Plan provided that “[n]o legal action can be brought more than two years after the date written proof of loss is required.” *Id.* The New York statute, N.Y. C.P.L.R. § 213(2) (2000), allows for a shorter time period when the parties agree in writing. An ERISA plan can be such a written agreement. 21 F.Supp. 2d at 293.

74. 21 F.Supp 2d at 293.

75. *Id.* at 297.

76. *Id.* at 296.

77. *Id.* The court also notes that the defendant could have tried to show that the plaintiff was in fact not prejudiced, by showing that he was aware of the plan’s two-year limitation. *Id.* at 297 n.7.

78. 940 F.2d at 973.

death and dismemberment policy that his employer made available to him.⁷⁹ The *Hansen* SPD detailed the amount of a spouse's coverage: "Your spouse will be insured as follows: 1. If there are eligible children, your spouse will be insured for an amount equal to 40% of the employee's benefit and an amount equal to 10% of the employee's benefit for each eligible child."⁸⁰ The insurance policy, however, provided for only forty percent of the plaintiff's benefit amount payable upon his wife's death.⁸¹

The court held that the SPD governed the determination of the plaintiff's benefit.⁸² However, the court declined to decide whether reliance was required. The plaintiff, in the court's opinion, had in fact demonstrated that he relied on the SPD by reading it and understanding it to mean that his benefit amount should be sixty percent.⁸³ Accordingly, the court did not need to reach the reliance question, and left it for another day.⁸⁴

b. *Schadler v. Anthem Life Insurance Co., 147 F.3d 388*
(5th Cir. 1998).

Schadler, another accidental death and dismemberment case, concerned an employee who died after a drug overdose.⁸⁵ His widow sought payment under the defendant's Voluntary Accidental Death & Dismemberment Policy. In part, the defendant argued that there was no coverage under the policy due to a drug-use exclusion.⁸⁶ The plaintiff argued that the exclusion was not in the SPD, so the defendants could not base their coverage decision on

79. *Id.* at 973-74.

80. *Id.* at 974. Hansen's benefit was \$200,000; therefore, the formula provided in the SPD led him to expect to receive 60% of his benefit or \$120,000 as a result of his wife's death. *Id.*

81. *Id.* at 980. The insurance policy in this case was included within the SPD as a separate certificate on subsequent pages. *Id.*

82. *Id.* at 982.

83. *Id.* at 983.

84. 940 F.2d at 983. However, the court suggested that it was sympathetic to a reliance requirement: "Whatever the merit of Continental's position [that reliance should be required], it is of no avail here. There simply is no reliance issue in this case." *Id.*

85. 147 F.3d at 391. The employee injected himself with cocaine, Desipramine, and morphine. *Id.* He had a history of illegal drug use. 1997 WL 181538, at *1 (N.D. Tex. 1997).

86. 147 F.3d at 392. The defendant made several arguments, including that the employee had never actually enrolled in the plan, that his coverage was barred due to a self-inflicted injury exclusion, and that his coverage was barred due to the drug-use exclusion. *Id.*

it.⁸⁷

Again, the Fifth Circuit declined to consider the defendant's reliance argument.⁸⁸ The defendant sought to base its coverage decision on the drug-use exclusion, despite its absence from the SPD, by arguing that the plaintiff did not prove reliance on the SPD.⁸⁹ The court declined to allow arguments on reliance, because the defendant did not raise them below.⁹⁰

c. Rhorer v. Raytheon Engineers and Constructors, Inc., 181 F.3d 634 (5th Cir. 1999).

In *Rhorer*, the plaintiff widow sought optional life insurance benefits as a result of her husband's death.⁹¹ The defendant denied her claim because her husband had not been actively at work when the life insurance purportedly went into effect.⁹² The plaintiff sued to recover benefits, basing her argument on the omission of the actively-at-work requirement from the SPD.⁹³

The Fifth Circuit reversed the lower court's grant of summary judgment for the defendant and remanded.⁹⁴ It decided that the SPD was in fact ambiguous, and that the defendant may have abused its discretion when it imposed the at-work eligibility requirement in denying plaintiff's claim.⁹⁵ However, the court again refused to find that reliance was a necessary part of the plaintiff's claim.⁹⁶

4. *The Ninth Circuit*

The Ninth Circuit Court of Appeals has not ruled on the

87. *Id.*

88. *Id.* at 393 n.4

89. *Id.*

90. *Id.*

91. 181 F.3d at 637.

92. *Id.*

93. *Id.* at 640. The SPD contained conflicting "actively at work" provisions. *Id.* at 641. The General Information section at the beginning of the SPD stated that benefits became effective as of the first of the month following an employee's hire date, provided the employee was actively at work on that day. *Id.*

94. *Id.* at 645.

95. *Id.* at 642-43.

96. 181 F.3d at 644 n.12. The court's recitation of the reliance it believed was present is strikingly similar to *Hansen*. The plaintiff received and read the SPD, understood that he would be eligible for \$990,000 in insurance benefits, and paid premiums for the coverage. *Id.* See also *supra* note 80.

reliance or prejudice issue.⁹⁷ The district court decisions are divergent. The Northern District of California expressly rejects the reliance or prejudice requirement, whereas districts in Oregon and Washington adopt the requirement.

In *Berry v. Blue Cross of Washington and Alaska*, the Western District of Washington held that the plaintiff, Berry, diagnosed with epithelial ovarian cancer, would be required to prove reasonable reliance on a faulty SPD in order to secure coverage for her autologous bone marrow transplant.⁹⁸ In a familiar pattern, the SPD appeared to cover all forms of transplants, yet the plan document excluded coverage for this type of transplant for cancer treatment.⁹⁹

The court, in adopting the reasonable reliance requirement, held that Berry must prove reliance on the SPD at the time she made her annual selection for medical coverage.¹⁰⁰ The court imposed this requirement even though Berry received the SPD only after she made this selection.¹⁰¹ Nevertheless, although she was diagnosed with cancer after she decided to continue with the Blue Cross Blue Shield plan, she had to prove reasonable reliance on the SPD in making her decision to select that plan, as opposed to other private or employer-provided medical insurance.¹⁰²

Under the reasoning in *Berry*, a participant who becomes ill at a time other than the annual enrollment period will not recover. This is because the plaintiff will normally only be able to show reliance on the faulty SPD to make treatment decisions, when the annual plan choice is locked in, rather than reliance during the enrollment period. The most troubling part of the reliance

97. *Adams v. J.C. Penney Co., Inc.*, 865 F.Supp. 1454, 1459 (D. Or. 1994) (citing *Long v. Flying Tiger Line, Inc. Fixed Pension Plan for Pilots*, 994 F.2d 692, 694-95 (9th Cir. 1993)).

98. 815 F.Supp. 359, 365 (W.D. Wash. 1993).

99. *Id.* at 360. The SPD stated: "If you need a [bone marrow transplant], Standard Option will help you pay for it. However, if you need a . . . bone marrow . . . transplant, you . . . must obtain written prior approval. . . before the treatment has begun." *Id.* The SPD's exclusion section also failed to list autologous bone marrow transplants. *Id.* at 361.

100. *Id.* at 365.

101. *Id.*

102. *Id.* . Although this requirement seems impossible, the court may have modified it slightly by adding the sentence: "The reasonableness of any reliance shown by plaintiffs is an issue for the factfinder." *Id.* Perhaps Berry could show that the previous year's SPD contained the same discrepancy, and so in making her purchasing decision for the year in question, she made some reasonable assumption that coverage would remain the same.

requirement as articulated in *Berry* is that the plaintiff may not have known that she had cancer at the annual enrollment period, so she would have had no reason to consider seeking additional coverage for bone marrow transplants at that time.

One year later, the Northern District of California came to a similar conclusion in *Kaiser Permanente Employees Pension Plan v. Bertozzi*.¹⁰³ The pension plan denied receiving the defendant's decedent's informal benefit election.¹⁰⁴ Before the formalities could be worked out, the defendant's decedent passed away.¹⁰⁵

The same court refused to grant Kaiser's motion for summary judgment on liability.¹⁰⁶ The SPD conflicted with the plan because it did not describe the exact procedure for obtaining valid spousal consent to a payment form that fails to protect the spouse.¹⁰⁷ The court considered the notarized letter important in declining Kaiser's summary judgment motion because there was at least a suggestion that the decedent relied on the SPD—she knew she needed some form of waiver to elect her benefit in a lump sum.¹⁰⁸

The court in *Adams v. J.C. Penney Co.* adopted the reliance requirement and held on summary judgment that the plaintiff, who was denied benefits under a business travel accident insurance policy, failed to show reasonable reliance on the faulty SPD.¹⁰⁹ To

103. 849 F.Supp. 692 (N.D. Cal. 1994).

104. *Id.* at 696. The plan permitted participants to receive pension benefits in a lump sum. *Id.* at 695. The defendant's decedent was ill and wished to receive her pension benefit. *Id.* Under ERISA, a married participant may elect to receive a pension benefit in a form that does not provide for continuing death benefits to a spouse. 29 U.S.C. § 1055(c)(1)(A)(i), ERISA § 205(c)(1)(A)(i). However, the spouse must waive the benefit and provide a notarized signature acknowledging the waiver. 29 U.S.C. § 1055(c)(2)(A), ERISA § 205(c)(2)(A). The defendant's decedent in this case wrote an informal letter of application requesting her benefit, which her husband and two witnesses signed. 849 F.Supp. at 695. However, her husband's signature was not notarized and it did not acknowledge waiver of the spousal benefit. *Id.*

105. 849 F.Supp. at 695. The plaintiff first refused to mail the election form to the defendant and her decedent. *Id.* The plaintiff also denied several times that it received the election letter. *Id.* at 695-96. After the defendant contacted Kaiser's pension department, she received a form for the decedent's husband to elect the spousal annuity he had purportedly waived in the informal election letter. *Id.*

106. *Id.* at 702.

107. *Id.* at 699. The SPD stated only that if the participant chooses "an option other than this Joint and Survivor Annuity, your spouse must consent to [the] election." *Id.* at 698.

108. *Id.* at 699. This inference of reliance is sufficient for the defendant to withstand summary judgment, but the defendant must still establish reasonable reliance at trial. *Id.*

109. 865 F.Supp. 1454, 1460 (D. Or. 1994). The business travel accident

show reliance, the plaintiff must “prove that he or she did or did not take action resulting in forfeiture of the very benefit sought.”¹¹⁰ Because Adams’ acts of reliance did not result in any forfeiture of benefits, the court denied her recovery.¹¹¹

Finally, the Northern District of California reversed its prior stance on reliance in *Lancaster v. United States Shoe Corp.*¹¹² Between the *Berry* and *Kaiser* decisions, the Ninth Circuit Court of Appeals decided *Atwood v. Newmont Gold Co., Inc.*¹¹³ *Atwood* expressly held, for the first time in the Ninth Circuit, that as between a conflicting SPD and plan document, the terms of the SPD controls the benefits payable under the plan.¹¹⁴ In *Atwood*, the plaintiff voluntarily resigned employment following a series of job changes.¹¹⁵ The defendant maintained a severance pay plan, which did not provide benefits to employees who voluntarily resigned, unless such resignation followed a “significant diminution in duties or responsibilities.”¹¹⁶ The defendant refused to pay severance benefits to the plaintiff after determining that he suffered no such diminution.¹¹⁷

The defendant made its determination exercising its sole discretion, as the plan document permitted it to do.¹¹⁸ The SPD, however, did not mention that the determination of benefits was to

insurance policy only provided for benefits due to total and irrecoverable hearing loss. *Id.* at 1455. The SPD failed to disclose this restriction on benefits, and the plaintiff filed a claim after losing 5.29% of her hearing in an automobile accident on the way to a business meeting. *Id.* Although Penney personnel advised the plaintiff that the policy precluded coverage for her hearing loss, she “made expenditures in greater amounts than she would have otherwise,” believing that she was entitled to benefits. *Id.* at 1456. The plaintiff gave her daughter money for college and “purchased a more expensive car than she otherwise would have.” *Id.*

110. *Id.* at 1461.

111. *Id.* at 1464. The court noted that one way Adams could show reliance was to show that she “received, read and understood the SPD,” and that she chose not to obtain other insurance that would provide coverage for partial hearing loss. *Id.* at 1461.

112. 934 F.Supp. 1137, 1154-55 (N.D. Cal. 1996).

113. 45 F.3d 1317 (9th Cir. 1995).

114. *Id.* at 1321.

115. *Id.* at 1320. The defendant reassigned the plaintiff twice in six months. *Id.* Both times, the defendant told the plaintiff that the job change was not a demotion. *Id.*

116. *Id.*

117. *Id.* The company determined that the plaintiff’s transfer from central shop foreman to second shift foreman did not entail “substantially less responsibility than *Atwood*’s previous assignments. . . .” *Id.*

118. *Id.* at 1321.

be made in the plan administrator's sole discretion.¹¹⁹ The court decided that this omission was not significant, because the SPD "amply informed Atwood that there was a danger that he would be ineligible for benefits if he resigned."¹²⁰ The *Atwood* opinion says nothing about a reliance requirement, because the "SPD for Newmont's plan was sufficient under ERISA."¹²¹

In turn, the *Newmont* court held that reliance was not required, citing *Atwood's* failure to mention reliance.¹²² The plaintiff, a long-time employee of U.S. Shoe, suffered a car accident that left him in need of "total assistance for virtually all of his daily living activities."¹²³ The SPD for the defendant's medical plan failed to set forth the plan's 365-day limit on convalescent care benefits.¹²⁴ The plaintiff had been in a convalescent care center for four years, and the plan paid his expenses the entire time.¹²⁵ However, the plan stopped paying the plaintiff's expenses, and this suit followed.¹²⁶ Holding that the SPD controlled under *Atwood*, the court did not require the plaintiff to show reliance.¹²⁷

However, the court's dependence on *Atwood* seems misplaced. In *Atwood*, the court did not face a substantively faulty SPD. All the required terms were contained in the *Atwood* SPD and the dispute centered on the plan administrator's discretion in interpreting the terms of the plan. To base a reversal of the reliance doctrine on a case that never reached reliance is unsound. In addition, the *Newmont* court noted in dicta that the plaintiff probably relied anyway.¹²⁸

119. 45 F.3d at 1321.

120. *Id.*

121. *Id.* at 1322.

122. 934 F.Supp. at 1154.

123. *Id.* at 1141.

124. *Id.* at 1141-42, 1144.

125. *Id.* at 1146.

126. *Id.* at 1149.

127. The *Newmont* court based its holding in part on *Atwood's* silence on the issue. *Id.* at 1154. It also based its holding on the "reasonable expectations" doctrine. *Id.* The reasonable expectations doctrine applies when a coverage exclusion is not clear or conspicuous enough to prevail over a participant's reasonable expectations of coverage. *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 386 (9th Cir. 1994). There is no mention of reliance in connection with the reasonable expectations doctrine. 934 F.Supp. at 1154.

128. 934 F.Supp. at 1155 n.2.

B. *The Sixth Circuit — Strict Liability*

1. *Edwards v. State Farm Mutual Automobile Insurance Company*

The Sixth Circuit approaches the reliance question from a different angle. In *Edwards v. State Farm Mutual Automobile Insurance Co.*, the plaintiff worked as a claim representative for the defendant for fifteen years.¹²⁹ The plaintiff was away from work on an approved paid sick leave for two hundred days.¹³⁰ After the plaintiff exhausted his paid time off, the defendant placed him on unpaid sick leave for nearly nine additional months.¹³¹ The conflict in *Edwards* arose after the pension plan denied the plaintiff's application for disability pension benefits. In denying the plaintiff's claim, the plan administrator relied on a plan provision that deemed an employee disabled as of the first day of absence from work.¹³² The SPD, by contrast, allowed time away from work on sick leave to count towards the plan's eligibility requirement for disability pension benefits.¹³³ Under the SPD's terms, the plaintiff had sufficient service to qualify for disability pension.¹³⁴ Under the plan's terms he did not.

In an oft-cited opinion, the *Edwards* court held that the SPD governed the determination of the plaintiff's benefits.¹³⁵ The court further found that the plaintiff relied on the SPD and other

129. 851 F.2d 134, 135 (6th Cir. 1988). The dissent portrayed the plaintiff as a "much admired, appreciated and longtime faithful employee of State Farm. . . ." *Id.* at 137.

130. *Id.* at 135.

131. *Id.* The plaintiff was on unpaid leave from May 13, 1982, until February 28, 1983. *Id.* While he was on unpaid leave, State Farm continued to send him annual benefit summaries, which indicated that his unpaid time away was counted for pension service. *Id.*

132. *Id.* The plan document defined disability as "the first workday of any period of time during which the active. . . member does not report to work for the company because of total disability. . . ." *Id.*

133. *Id.* The SPD clearly states: "Time while on sick leave counts as service for plan membership and vesting and also counts as credited service used to determine your retirement income." *Id.*

134. *Id.* To qualify for disability benefits, the sum of the plaintiff's age and years of service must have been at least fifty-five before the date of disability. *Id.* Had the plan counted the plaintiff's two hundred days of paid sick leave, the plaintiff would have satisfied this eligibility requirement. *Id.*

135. 851 F.2d at 137. As of October 15, 2001, *Edwards* has been cited 116 times.

communications from State Farm benefits personnel.¹³⁶ However, the final paragraph of the *Edwards* majority opinion creates the split among the circuits:

Although in the instant case, the appellee relied to his detriment upon the language of the [SPD], Hills' reassuring letter, and the 1982-1983 report of his accrued employment service, *existing precedent does not dictate that a claimant who has been misled by summary descriptions must prove detrimental reliance*. Congress has promulgated clear directives prohibiting misleading summary descriptions. This court elects not to undermine the legislative command by imposing technical requirements upon the employee.¹³⁷

2. *The Kelsey-Hayes cases*

The Sixth Circuit held for the plaintiff in *Edwards*. In 1996, the court tackled a thorny but common ERISA litigation issue: the right of employers to modify post-retirement health care benefits. The case was *Helwig v. Kelsey-Hayes Co.*¹³⁸ In 1994, the Kelsey-Hayes Company significantly increased costs for retiree health care.¹³⁹ Several groups of retirees filed suit seeking injunctive and other relief to prevent the changes from going into effect.¹⁴⁰ The *Helwig* plaintiffs argued that numerous SPDs promised lifetime unchanged health benefits to retirees.¹⁴¹ The defendant, by contrast, argued

136. *Id.* The plaintiff relied on the SPD, the annual benefit summaries and a letter from State Farm's benefit manager advising him that he had qualified for disability pension benefits. *Id.*

137. *Id.* (emphasis added). *Edwards* is cited for this proposition numerous times. However, some courts have been careful to note that because the *Edwards* court found that the plaintiff did in fact rely, the statement quoted above is dicta. *E.g.*, *Kaiser Permanente Employees Pension Plan v. Bertozzi*, 849 F.Supp. 692, 698 (N.D. Cal. 1994). This controversy is not definitively resolved, and as the remaining Sixth Circuit discussion shows, this quote is often cited as the rule in *Edwards*.

138. 93 F.3d 243 (6th Cir. 1996).

139. *Id.* at 245. The defendant increased costs for retiree monthly premiums and instituted deductibles and co-payments. *Id.*

140. *E.g.*, *Golden v. Kelsey-Hayes Co.*, 954 F.Supp. 1173, 1188-89 (E.D. Mich. 1997) (granting summary judgment to retiree plaintiffs on liability and requiring defendant to maintain health benefits at level in place when plaintiffs retired); *Hinckley v. Kelsey-Hayes Co.*, 866 F.Supp. 1034, 1046 (E.D. Mich. 1994) (granting preliminary injunction to plaintiffs to prevent cost increases from becoming effective).

141. 93 F.3d at 245-46. The defendant issued the SPDs in question between

that the SPDs contained provisions that required the master health insurance agreements between the company and the insurer to control the provision of health benefits. Significantly, those agreements permitted cancellation at any time.¹⁴²

The court found that the SPDs and the master insurance agreements conflicted, so the SPDs controlled.¹⁴³ The *Helwig* plaintiffs did not plead nor set out to prove reliance.¹⁴⁴ As the court explained, they were not required to:

[I]t was reasonable for the Plaintiff employees in this case to believe that if they retired while the 1977 or 1984 SPDs were in effect, they would be entitled to the specified health benefits promised at no cost to them. . . . In this circuit, under *Edwards*, companies are held to the promises they make in their SPDs.¹⁴⁵

The *Helwig* court, affirming *Edwards*, assumed that the plaintiffs relied on the free health benefits promised by Kelsey-Hayes.¹⁴⁶ The rule,¹⁴⁷ then, in the Sixth Circuit provides that a

1977 and 1990. *Id.* The SPDs contained headings such as “KELSEY HAYES PAYS THE FULL COST FOR [HEALTH BENEFITS]” and promises such as “When you are retired, your Health Care coverages. . . are continued without cost to you.” *Id.* at 246.

142. *Id.*

143. *Id.* at 250. The court pointed out that the SPDs under review did not contain a provision that allowed the company to terminate or modify retiree health coverage at any time. *Id.* The defendant added such a provision in the 1990 SPD. *Id.* at 246.

144. See generally *Helwig v. Kelsey-Hayes Co.*, 857 F.Supp. 1168, 1172-80 (E.D. Mich. 1994) (containing no discussion of reliance on SPDs).

145. 93 F.3d at 249.

146. *Id.* at 250. The court decided that “[w]hen making decisions about where and how long to work, employees, like the plaintiffs in this case, rely on the promises made to them, particularly when those promises are in writing.” *Id.*

147. The only exception to this rule occurs when the SPD is silent on a term that is disclosed in the plan. In *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998), the court said “the principle announced in *Edwards* does not apply to silence. . . . An omission from the summary plan description does not, by negative implication, alter the terms of the plan itself.” See also *Moon v. White*, 909 F.Supp. 1047, 1055 (E.D. Tenn. 1993) (noting SPD’s silence on proof-of-claim requirements for long-term disability plan does not constitute a conflict with the plan document). *Moon* is an unusual Sixth Circuit case, because although the court finds no conflict between the SPD and the plan document, it discusses reliance and holds that the plaintiff was not entitled to disability benefits on the basis of an SPD that omitted proof of claim deadline information. *Id.* at 1056. The court determined that although the SPD was flawed, the plaintiff did not rely on it when deciding when to submit his long-term disability claim. *Id.* at 1056. *Moon* cites *Christie v. K-Mart Corp. Employees Ret. Pension Plan*, 784 F.Supp. 796, 805-

plaintiff need not show reliance to recover benefits according to an SPD that conflicts with the underlying plan document.¹⁴⁸

C. The Remaining Circuits – Reliance, Prejudice, or Both

1. The First Circuit

The leading case in the First Circuit on the reliance question is *Bachelder v. Communications Satellite Corp.*¹⁴⁹ *Bachelder* concerned an employee stock ownership plan (ESOP) that allowed inservice withdrawals at the end of the seventh year of an employee's participation.¹⁵⁰ The issues were the timing of the valuation of stock involved in the distribution¹⁵¹ and an alleged conflict between

06 (D. Kan. 1992) for the reliance proposition, but *Christie* is a Tenth Circuit case and not mandatory precedent in the Sixth Circuit. *But see Adams v. S. Labor Union Pension Trust Fund*, No. 96-5943, 1997 WL 468323, at *4 (6th Cir. 1997), which held that time limits for disability benefit claim filings omitted from the SPD could not be applied to bar the plaintiff's claim for benefits "if the plaintiffs relied upon, or were prejudiced by, the omission." *Id.* The Sixth Circuit sent *Adams* back to the district court for determination of whether the plaintiffs relied on, or were prejudiced by, the omission in the SPD. *Id.* The legal treatment of omission of claim filing deadlines from the SPD is not settled in the Sixth Circuit, although such terms could reasonably be considered "circumstances which may result in denial or loss of benefits. . . ." 29 U.S.C. § 1022(b), ERISA § 102(b).

148. The expression of the rule varies, especially among the district courts. "The summary will trump the plan when employees could reasonably rely on the summary to their detriment, and the employer is estopped from stating rights in the summary and not honoring that statement." *Coleman v. Aegon Ins. Group*, 71 F.Supp 2d 714, 718 (W.D. Ky. 1999) (holding that equitable principles require the plan to control the SPD when the plan is more favorable to the employees and then the employer may not enforce the SPD); "*Helwig* and *Edwards* do not require a showing of detrimental reliance and are controlling precedent," *Golden v. Kelsey-Hayes Co.*, 954 F.Supp. 1173, 1185 (E.D. Mich. 1997) (holding SPDs as a matter of law promised free lifetime health care coverage and granting summary judgment to plaintiff retirees); "[A]t least in this circuit, the plaintiff need not establish detrimental reliance on the summary." *Parrett v. Am. Ship Bldg. Co.*, No. C87-211, 1992 WL 476851, at *5 (N.D. Ohio 1992) (holding plaintiff can only use SPD to enforce benefits which are conceivably his under the plan and allowing a reversion of incorrectly contributed pension assets to plaintiff would result in an unconscionable windfall that court cannot endorse).

149. 837 F.2d 519 (1st Cir. 1988).

150. *Id.* at 520.

151. *Id.* The plaintiffs were entitled to a distribution on December 31, 1983. *Id.* On December 31, 1983, the stock within the ESOP traded at \$32.75 on the New York Stock Exchange. *Id.* However, the trustees of the plan sold the stock "several weeks later" for \$25.75 per share, and used this amount to value the plaintiffs' distributions. *Id.*

the SPD and the plan.¹⁵² The court held that the plan governed the determination of plaintiffs' benefits,¹⁵³ but even if the SPD governed, the plaintiffs would be unable to recover because they did not "show significant reliance or even the possibility of prejudice flowing from the SPD."¹⁵⁴ Other First Circuit cases have followed *Bachelor* in requiring reliance or prejudice.¹⁵⁵

152. *Id.* The plan document did not specify the date on which the shares of stock were to be sold. *Id.* The plan committee developed procedures for selling stock between 1976 (the year the plan was established) and 1983 (the year of the plaintiffs' distributions). *Id.* These procedures required the committee to determine the exact number of shares in the participant's account and then take steps to sell the shares. *Id.* at 522. The procedure took six to eight weeks, a timeframe the court found to be reasonable. *Id.* The SPD, by contrast, provided an example that implied that plaintiffs would receive the December 31 value of their stock: "[At the end of] 1983, . . . your account grew in value to \$1,200. . . . As soon as possible after the end of 1983, you'd receive a payout in . . . cash equal to \$1,200." *Id.*

153. *Id.* at 522. The SPD was ambiguous because in a declining stock market, the example as set forth in the SPD would require the plan's trustees to sell the stock of one beneficiary to meet the December 31 valuation date for other beneficiaries who had elected distributions. *Id.* at 521. The tension between the SPD example and the plan's function – to provide promised benefits to every participant – rendered the SPD ambiguous. *Id.* The plan's structure therefore supported the trustees' cash conversion procedures, and the SPD did not govern the plaintiffs' claims. *Id.*

154. *Id.* at 522-23. The plaintiffs argued that they relied to the extent that they expected more money than they received. *Id.* at 523. However, the court found that the plaintiffs did not act on this expectation, so they were not entitled to recover: "A mere expectation is not enough. . . ." *Id.* at n.6. The court went on to make an interesting point: "It is worth noting that participants who opted for distribution in shares of stock were affected even more than those who opted for distribution in cash, because after the conversion into cash the prices of stock continued declining. Appellees suffered no detriment because they chose the best of the only two options." *Id.* Shares of Comsat (NYSE: CQ) closed at \$25.875 on December 31, 1984, and rose to \$35.50 by December 31, 1985. Thirteen years later, on December 31, 1998, the stock closed at \$72.00. Silicon Investor Historic Stock Quotes, at <http://www.siliconinvestor.com/research/historical.gsp> (last visited September 30, 2001).

155. *E.g.*, *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51, 55 (1st Cir. 2001) (rejecting re-hired employee's claim for increased pension benefits because no reliance shown in employee refusing a more lucrative job with a competitor, making home improvements, and deciding that his spouse need not return to work); *Govoni v. Bricklayers, Masons & Plasterers Int'l Union of Am., Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984) (refusing to find reliance when plaintiff averred he might have postponed his retirement had he known his pension would be smaller); *Mattias v. Computer Sci. Corp.*, 50 F.Supp. 113, 115 (D.R.I. 1999) (refusing award of long-term disability benefits to plaintiff when SPD was faulty because plaintiff did not prove reliance or incur detriment).

2. *The Third Circuit*

The leading faulty SPD case in the Third Circuit is *In re Unisys Corp. Retiree Medical Benefit “ERISA” Litigation*.¹⁵⁶ The Third Circuit’s standard of recovery is more stringent than the other federal circuits, because it requires the plaintiff to prove the elements of an equitable estoppel claim, including “extraordinary circumstances,” to recover from a faulty SPD.¹⁵⁷

In *Unisys*, the company published SPDs that both promised retiree medical benefits “for life” and contained explicit reservation of rights clauses.¹⁵⁸ The intra-SPD ambiguity was whether the lifetime benefit promise trumped the reservation of rights clause or whether it was subject to the clause. The court decided that the promise of lifetime benefits was modified by the reservation rights clause, in that the retirees could expect lifetime benefits as long as the plan remained in existence.¹⁵⁹

The retirees brought several claims, among them an equitable estoppel claim.¹⁶⁰ The court held that because the reservation of rights clause was unambiguous, the retirees could not establish reasonable detrimental reliance upon a lifetime promise of benefits.¹⁶¹

Other Third Circuit decisions have followed *Unisys* in requiring that plaintiffs establish the elements of an equitable estoppel claim to recover on the basis of a faulty SPD.¹⁶²

156. 58 F.3d 896 (3d Cir. 1995).

157. *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir. 1991).

158. 58 F.3d at 900. One illustrative SPD contained the following language in the section that described plan benefits: “Coverage continues for you for life and for your dependents while they remain eligible. . . .” *Id.* Elsewhere in that same SPD, the Plan Continuation section said, “[the] Company expects to continue the Plans, but reserves the right to change or end them at any time.” *Id.*

159. *Id.* at 904.

160. *Id.* at 907. Elements of an equitable estoppel claim to recover on the basis of a faulty SPD include “a material misrepresentation, detrimental reliance upon the representation, and extraordinary circumstances.” *Id.*

161. *Id.* The unambiguous nature of the reservation of rights clause bolstered the court’s decision that almost no reliance on the lifetime promise of benefits could be established. *Id.* at 908.

162. *E.g.*, *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co.*, 188 F.3d 130, 151 (3d Cir. 1999) (affirming district court’s grant of summary judgment for defendant because plaintiffs could not satisfy any elements of their equitable estoppel claim for lifetime retiree medical and other benefits); *Hein v. Fed. Deposit Ins. Corp.*, 88 F.3d 210, 221-22 (3d Cir. 1996) (reversing district court’s grant of summary judgment for plaintiff because plaintiff not entitled to rely on actuary’s letter describing vested early retirement benefits); *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 235-38 (3d Cir.

3. *The Fourth Circuit*

The leading faulty SPD case in the Fourth Circuit is *Pierce v. Security Trust Life Insurance Co.*¹⁶³ *Pierce* concerned retirees who objected to modification of their postretirement medical benefits.¹⁶⁴ The defendant issued a SPD in 1980 and annual benefit summaries, neither of which contained unilateral termination or modification right vested in the company.¹⁶⁵ However, in 1984, the defendant issued a new SPD to employees and retirees, which allowed it to unilaterally change or terminate the Plan.¹⁶⁶

The *Pierce* court found that in the event of a direct conflict between the Plan and the SPD, in the form of an omitted reservation of rights to terminate or modify the plan, the SPD would control.¹⁶⁷ However, there was no omission in this case, because the post-1984 SPDs allowed the defendant to unilaterally modify or terminate the plan.¹⁶⁸ Even if there had been an omission, the court found that the plaintiffs must show “reliance and prejudice in order to recover for an employer’s failure to comply with ERISA’s statutory requirements. . . .”¹⁶⁹ The court rejected the district court’s finding that “in instances where the company wholly fails to inform its employees that their benefits are subject to change at the employer’s whim, reliance and prejudice can be presumed.”¹⁷⁰ Other Fourth Circuit cases have followed

1994) (finding for plaintiff in claim for supplemental accidental death and dismemberment benefits based on faulty SPD when plaintiff showed material misrepresentations, reasonable and detrimental reliance and extraordinary circumstances). *But see* Fields v. Provident Life & Accident Ins. Co., No. CIV.A 99-CV-4261, 2001 WL 818353, at *4 (E.D. Penn. 2001) (allowing plaintiff to recover on the basis of misleading SPD without showing any elements of equitable estoppel).

163. 979 F.2d 23 (4th Cir. 1992).

164. *Id.* at 24. The Security Trust Life Insurance plan provided for no-cost retiree medical benefits prior to January 1, 1989. *Id.* On January 1, 1989, the company amended the plan to require monthly retiree contributions of up to \$95 toward the cost of the plan. *Id.* at 25. The district court found for the plaintiffs in their motion for summary judgment, and the company appealed. *Id.* at 24.

165. *Id.* at 24-25.

166. *Id.* at 25. The defendant also issued a booklet in 1986 that expressly set forth the possibility of an amendment or termination of the plan. *Id.*

167. *Id.* at 28.

168. *Id.* at 30. The court also discussed vesting of medical benefits and found, notwithstanding the plaintiff’s arguments of oral modifications of the plan and equitable estoppel, that the retiree medical benefits were not vested. *Id.* at 28-30.

169. 979 F.2d at 30 (quoting *Govoni v. Bricklayers, Masons & Plasterers Int’l Union of Am., Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984)).

170. *Id.* The court decided on the record before it that there could be “no

Pierce in requiring reliance or prejudice.¹⁷¹

4. *The Seventh Circuit*

The reliance or prejudice question has an interesting history in the Seventh Circuit. Beginning with *Senkier v. Hartford Life & Accident Insurance Co.*, the court stated the general rule: “[29 U.S.C. 1022(a)(1)] entitles the participant to rely on the summary plan document, and if he does the plan is estopped to deny coverage.”¹⁷² However, the court noted next that this rule only applies where there is an actual conflict between the underlying plan document and the SPD.¹⁷³ In *Senkier*, the policy clarified the SPD and did not contradict it, so the policy coverage applied.¹⁷⁴

Hightshue v. AIG Life Insurance Company presented a direct conflict case.¹⁷⁵ In the case of a direct conflict, the SPD controls over the plan only where the participant shows “some significant reliance upon, or possible prejudice flowing from, the faulty description.”¹⁷⁶ The plaintiff in *Hightshue* did not recover due to

factual basis” for reliance or prejudice. *Id.* The plaintiffs suffered no prejudice in the modification of their retiree medical benefits because they had no vested right to them. *Id.*

171. *E.g.*, *Martin v. Blue Cross & Blue Shield of Va.*, 115 F.3d 1201, 1205 n.4 (4th Cir. 1997) (finding no conflict but in the event of conflict, plaintiff would be unable to argue that she suffered reliance or prejudice); *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1478-79 (4th Cir. 1996) (finding conflict between SPD and plan document but no reliance or prejudice where plaintiff did not receive SPD until after he filed claim for long-term disability benefits); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 859 (4th Cir. 1994) (finding that non-receipt of an SPD can equal a faulty SPD but requiring reliance on or prejudice from “the lack of notice of an accurate description of the terms of the plan”); *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 141-42 (4th Cir. 1993) (finding that reliance or prejudice required and remanding to district court for findings of fact on reliance or prejudice); *Fuller v. FMC Corp.*, 4 F.3d 255, 261-62 (4th Cir. 1993) (finding no reliance or prejudice where employees were terminated due to a sale of a plant prior to attaining age fifty-five and pension SPD only provided for early retirement if termination occurred after fifty-five, because circumstances of termination were beyond employees’ control).

172. 948 F.2d 1050, 1051 (7th Cir. 1991).

173. *Id.*

174. *Id.*

175. 135 F.3d 1144 (7th Cir. 1998). The plaintiff worked at Dow Chemical and was exposed to chemicals three times in the workplace. *Id.* at 1146. She resigned after the third exposure. *Id.* She applied for disability benefits, which the defendant denied. *Id.* at 1147. The plan document and SPD conflicted because the SPD did not contain the same coverage exclusions as the plan document did. *Id.* at 1149.

176. *Id.* at 1149 (quoting *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th

lack of reliance (she did not read the SPD before the chemical exposure) or prejudice (her claim was fully heard on the merits).¹⁷⁷

The next case to consider the question of a conflicting SPD and plan document was *Mers v. Marriott International Group Accidental Death and Dismemberment Plan*.¹⁷⁸ In *Mers*, the SPD did not define the word “injury,” whereas the plan defined it as “bodily injury caused by an accident . . . and resulting directly and independently of all other causes.”¹⁷⁹ The court sketched two possible scenarios that would govern the SPD’s silence on a term.¹⁸⁰ As a threshold matter, the court must decide if the SPD satisfied ERISA’s disclosure requirements.¹⁸¹ If the SPD was “accurate and sufficiently comprehensive to reasonably apprise participants and beneficiaries of their rights and obligations,” then the participant may rely (and must show reliance) only where there is a direct conflict, as opposed to silence, between the SPD and the plan.¹⁸² If, however, the SPD does not meet the requirements under ERISA, “the court may estop a plan administrator from denying coverage for terms not included in the SPD but found in the underlying plan.”¹⁸³ Therefore, when an SPD is silent on a term but otherwise meets ERISA’s disclosure requirements, the plan may rely on the more detailed plan document or underlying policy.¹⁸⁴

Notwithstanding the conflict/silence dilemma, courts in the Seventh Circuit have consistently held that for the SPD to trump the plan, the participant must show some reliance on the SPD.¹⁸⁵

Cir. 1996)).

177. *Id.*

178. 144 F.3d 1014 (7th Cir. 1998).

179. *Id.* at 1018. The participant in *Mers* had coverage under two accidental death and dismemberment plans, one employer-provided business travel accident plan, and one twenty-four-hour optional plan for which employees paid the full cost. *Id.* The defendant mistakenly only processed the plaintiff’s claim for benefits under the 24-hour optional plan. *Id.* The twenty-four-hour optional plan’s SPD and underlying policy both contained the injury definition, but the business travel accident SPD omitted it. *Id.* The court’s analysis thus focused on the business travel accident SPD. *Id.* at 1024.

180. *Id.* at 1022.

181. *Id.*

182. *Id.* at 1024 (citing 29 U.S.C. §1022(a)(1)).

183. *Id.* at 1022.

184. 144 F.3d at 1023.

185. *E.g.*, *Senese v. Chicago Area I.B. of T. Pension Fund*, 237 F.3d 819, 823 (7th Cir. 2001) (stating in dicta that plaintiff’s claim would fail, even if the court found a direct conflict between the SPD and plan, because plaintiff did not allege or provide evidence of reliance); *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999) (stating in dicta that in the event of a conflict,

5. *The Eighth Circuit*

The leading faulty SPD case in the Eighth Circuit is *Maxa v. John Alden Life Insurance Co.*¹⁸⁶ The plaintiff's decedent participated in a group health insurance plan that the defendant issued.¹⁸⁷ At age sixty-five, the plaintiff's decedent's monthly health insurance premium reduced from \$210.00 to \$134.00.¹⁸⁸ The plaintiff's decedent did not apply for Medicare benefits when he attained age sixty-five.¹⁸⁹ In 1989, the plaintiff's decedent was still actively employed when he went into the hospital for an extended period of time, incurring significant medical and hospital bills.¹⁹⁰ Following his death, the plan refused to pay a portion of those bills, because the plaintiff's decedent would have received benefits from Medicare, had he applied.¹⁹¹

The SPD in *Maxa* was the group insurance certificate.¹⁹² It contained a section entitled "Coordination of Benefits," which stated:

We will coordinate your Medical and Dental Benefits (if applicable) with benefits payable under other plans. The other plans are those which provide benefits or service in connection with medical or dental care or treatment through . . . 4. Medicare (Parts A & B) when you are eligible for Medicare coverage. For purposes of determining your Medicare benefits, you will be deemed to have enrolled for all coverages for which you are eligible under Medicare. . . whether or not you actually enroll.¹⁹³

the SPD controls when the participant has reasonably relied on the SPD to his detriment); *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 499 (7th Cir. 1999) (noting that SPD controls over plan document only when participant has relied on the SPD); *Doyle v. Local 25*, No. 97 C 6814, 1999 WL 1044206, at *12 (N.D. IL 1999) (noting that the nature of reliance required in the Seventh Circuit is unclear but that plaintiff's reliance evidence could withstand defendant's motion for summary judgment, but not enough to entitle plaintiff to summary judgment).

186. 972 F.2d 980 (8th Cir. 1992).

187. *Id.* at 981.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. 972 F.2d at 982.

193. *Id.* Coordination of benefits impacts participants who have medical coverage under more than one plan. The plans work together to ensure that the

The plaintiff argued that the SPD was faulty because it did not explicitly state that benefits which would have been received from Medicare, whether plaintiff's decedent applied for Medicare or not, would be offset against plan benefits.¹⁹⁴

The court held for the plan, finding that although the SPD language is not completely clear, it "can reasonably be read to imply that benefit coverage will be reduced by the amount of Medicare coverage for which one is eligible."¹⁹⁵ The court believed that the SPD was nonetheless faulty under ERISA for other reasons, but plaintiff failed to recover because he could not show reliance or prejudice on the SPD.¹⁹⁶

The *Maxa* plaintiff's decedent, like *Ritzer*, had passed away before the litigation.¹⁹⁷ However, the court did not substitute the lighter prejudice standard and instead enforced the more burdensome reliance standard, requiring the plaintiff to show that "the plan description caused the estate's decedent not to apply for Medicare."¹⁹⁸ The plaintiff could not show this, so the estate did not recover.

Other Eighth Circuit cases have followed *Maxa* in requiring reliance, detrimental reliance, or prejudice.¹⁹⁹

6. *The Tenth Circuit*

The leading faulty SPD case in the Tenth Circuit is *Chiles v. Ceridian Corp.*²⁰⁰ The defendant maintained a long-term disability

participant does not receive payment in excess of 100% of the value of his claims.

194. *Id.* at 983.

195. *Id.* at 984.

196. *Id.*

197. *Id.* at 981. *See also supra* notes 49-54.

198. 972 F.2d at 984.

199. *E.g.*, *Palmisano v. Allina Health Sys., Inc.*, 190 F.3d 881, 887-88 (8th Cir. 1999) (affirming summary judgment for defendant because faulty plan booklet was not SPD and plaintiff could not show reliance on the booklet); *Dodson v. Woodmen of the World Life Ins. Soc'y*, 109 F.3d 436, 439 (8th Cir. 1997) (affirming district court holding for plaintiff where plaintiff was prejudiced because time limit for filing disability claim was omitted from SPD); *Harris v. Blue Cross Blue Shield of Mo.*, 995 F.2d 877, 880 (8th Cir. 1993) (stating in dicta that to recover from faulty SPD, plaintiff must show significant reliance or possible prejudice); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1520 (8th Cir. 1988) (affirming judgment for defendant on question of vested retiree medical benefits where plaintiffs could not show evidence of reliance); *Lee v. Union Elec. Co.*, 789 F.2d 1303, 1308 (8th Cir. 1986) (holding that to secure relief on faulty SPD, the plaintiff must show reliance or prejudice).

200. 95 F.3d 1505 (10th Cir. 1996).

plan and the plaintiffs all received disability benefits from the plan.²⁰¹ Following a sale of the division for which the plaintiffs had worked, the buyer agreed to establish a new long-term disability plan to cover the plaintiffs.²⁰² The issue in *Chiles* surrounded the defendant's promise to pay health, dental and life insurance premiums on the plaintiffs' behalf "while [they were] on Long-Term Disability Status."²⁰³

The defendant amended the health insurance plan in January 1993.²⁰⁴ This amendment required the plaintiffs to pay premiums for their health insurance coverage.²⁰⁵ The plaintiffs, citing the SPD promise above, brought this suit alleging breach of contract and violation of fiduciary duties.²⁰⁶

The reliance issue in this case concerned a termination provision in the long-term disability plan SPD.²⁰⁷ The plaintiffs argued that the sale of their division triggered a termination of the long-term disability plan and vested their rights to free health

201. *Id.* at 1508.

202. *Id.* Seagate Technology bought the plaintiffs' former division. *Id.* The defendant transferred assets to Seagate to cover the liabilities associated with the plaintiffs' long-term disability claims. *Id.*

203. *Id.* The Long-Term Disability Plan SPD contained the following promise: While on Long-Term Disability Status the company will pay the premiums for all the company-sponsored benefits (medical, life and dental) for which you and your dependents were enrolled before your disability began. The company will continue paying all premiums until you and your dependents are no longer eligible for the plans.

Id. The medical plan document plan also provided that the defendant would bear the cost of coverage during a period of an employee's disability. *Id.* at 1509. The Long-Term Disability Plan document was silent on the issue. *Id.* All of the defendant's plans contained amendment and termination reservation of rights provisions. *Id.* Following the sale, the defendant notified the plaintiffs that it intended to continue to pay their premiums, subject to a reserved right to change or cancel the arrangement. *Id.*

204. *Id.*

205. *Id.*

206. 95 F.3d at 1509. The court also certified the plaintiffs for class status. *Id.*

207. *Id.* at 1519. The SPD stated: "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." *Id.* at 1509. The plaintiffs argued that the term "benefits" included free health insurance premiums, while the defendants argued that "benefits" meant only salary continuation. *Id.* at 1514. The court determined that the plan in fact terminated. *Id.* at 1515-16. The court further decided that the term "benefit" is ambiguous. *Id.* at 1519.

insurance premiums.²⁰⁸ The defendant argued, by contrast, that health insurance was provided through the health care plan, which had not terminated.²⁰⁹ The court found that the long-term disability SPD did not specify that the provision of free health insurance originated in the health insurance plan.²¹⁰ Accordingly, there was an inconsistency between the SPD and the plan. To recover, each plaintiff must show significant reliance on, or possible prejudice flowing from, the faulty SPD.²¹¹

Other Tenth Circuit cases follow *Chiles* in requiring reliance or prejudice.²¹²

7. *The Eleventh Circuit*

The leading faulty SPD case in the Eleventh Circuit is *Branch v. G. Bernd Co.*²¹³ The plaintiff's decedent terminated his employment and the defendant notified him of his COBRA continuation rights.²¹⁴ When the plaintiff's decedent completed his form, however, he declined COBRA coverage for his dependents but did not make any election for himself.²¹⁵ The plaintiff's decedent subsequently was admitted to the hospital, where he died after several days, leaving \$98,000 in unpaid medical bills.²¹⁶

208. *Id.* at 1514.

209. *Id.* at 1518.

210. *Id.*

211. *Id.* at 1519 (citations omitted). The court further determined that each plaintiff must show his own reliance or prejudice, so on remand, the class certification was no longer valid. *Id.*

212. *E.g.*, *Stamper v. Total Petroleum Inc. Ret. Plan*, 188 F.3d 1233, 1243 (10th Cir. 1999) (affirming summary judgment for defendant when plan and SPD did not conflict and if there were a conflict, plaintiffs did not claim detrimental reliance on SPD). *But see* *White v. Keychoice Welfare Benefit Plan*, 827 F.Supp. 690, 697-98 (D. Wyo. 1993) (granting plaintiff's motion for summary judgment when SPD conflicted with plan in failing to disclose that air ambulance service in rural area would not be covered but requiring no showing of reliance or prejudice).

213. 955 F.2d 1574 (11th Cir. 1992).

214. *Id.* at 1576. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) provides for continuation of health coverage following certain "qualifying events," including termination of employment. 29 U.S.C. § 1161, ERISA § 601. The plan sponsor is required to allow a plan participant, who would otherwise lose coverage, to continue that coverage within the statute's parameters. *Id.*

215. 955 F.2d at 1576. The plaintiff's decedent had no dependents. *Id.*

216. *Id.* A gunman shot the plaintiff's decedent "several times," leaving him in a semi-comatose state. *Id.* The Patient Accounts Manager at the hospital was subsequently named the temporary administrator of the plaintiff's decedent's estate. *Id.* at 1577. The plaintiff then tried to elect COBRA coverage on the

The *Branch* SPD stated that the time period for electing COBRA coverage was thirty-one days.²¹⁷ However, the plan accurately stated COBRA's minimum election period of sixty days.²¹⁸ The SPD was therefore faulty and the plaintiff sought an extension of the decedent's medical insurance coverage.²¹⁹ However, the court found that because there was no evidence that the plaintiff's decedent read or relied on the SPD, and in fact the plaintiff's decedent showed an "absolute apathy" about his health care coverage, the terms of the plan controlled.²²⁰

Other Eleventh Circuit cases follow *Branch* in requiring reliance or prejudice.²²¹

IV. STANDARDS FOR RECOVERY

The district and circuit courts have thus adopted at least four standards for recovery when a faulty SPD is asserted to control over the underlying plan document. These standards are reliance,

decedent's behalf, but the defendant denied the election due to the form that the decedent had previously completed. *Id.*

217. *Id.* at 1578.

218. *Id.* See also 29 U.S.C. § 1165(1), ERISA § 605(1) (defining "election period").

219. 955 F.2d at 1577.

220. *Id.* at 1579-80. The court observed that the purpose of an SPD is to protect plan participants by "insuring that employees are fully and accurately apprised of their rights under the plan." *Id.* at 1579 (quoting *In re HECI Exploration Co.*, 862 F.2d 513, 524 (5th Cir. 1988)). To meet Congress' objective in requiring SPD accuracy, "[b]eneficiaries must do their part. . . ." *Id.*

221. *E.g.*, *Collins v. Am. Cast Iron Pipe Co.*, 105 F.3d 1368, 1371 (11th Cir. 1997) (reversing judgment for plaintiff because no reliance possible when plaintiff did not read the SPD until after he filed suit); *McKnight v. S. Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985) (finding that employees must be able to rely on SPDs over plan documents for fairness reasons); *McNutt v. J.A. Jones Constr. Co.*, 33 F.Supp. 2d 1375, 1380 (S.D. Ga. 1998) (denying defendant's motion for summary judgment because SPD omitted deadline for filing long-term disability claim and plaintiff stated in affidavit that he relied on the SPD); *Vann v. Nat'l Rural Elec. Coop. Ass'n Ret. & Sec. Program*, 978 F.Supp. 1025, 1034 n.5 (M.D. Ala. 1997) (granting defendant's motion for summary judgment because plaintiff did not rely on the SPD); *Thompson v. Fed. Express Corp.*, 809 F.Supp. 950, 957-58 (M.D. Ga. 1992) (granting plaintiff's motion for summary judgment on reimbursement of disability benefits because plaintiff showed she relied on faulty SPD by following lawyers' advice); *Freund v. Gerson*, 610 F.Supp. 69, 71 (M.D. Fla. 1985) (finding for defendant because plaintiff failed to show reliance or prejudice on incorrect SPD); *Eager v. Savannah Foods & Indus.*, 605 F.Supp. 415, 419 (N.D. Ala. 1984) (finding for defendant because plaintiffs did not show detrimental reliance on SPD). *But see Luton v. Prudential Ins. Co. of Am.*, 88 F.Supp. 2d 1364, 1374 (S.D. Fla. 2000) (finding for plaintiff on basis of faulty SPD with no discussion of plaintiff's reliance or prejudice).

equitable estoppel, strict liability, and prejudice.

A. *Reliance*

Reliance has evolved as a theory for recovery in contract.²²² When one party to the contract makes a promise, as when it publishes an SPD, the party seeking to enforce the promise must show that he relied on it in some way.²²³ Generally, the successful contract plaintiff's reliance takes the form of out-of-pocket expenses or a changed position.²²⁴ Courts considering ERISA claims have been inconsistent in determining how much reliance is sufficient. Some courts require that the plaintiff show a significantly changed position in response to the faulty SPD.²²⁵ Others allow a plaintiff to demonstrate some lesser level of reliance, such as reading the SPD and understanding it to provide a certain level of benefit.²²⁶ Most courts are unwilling to find that a plaintiff

222. See RESTATEMENT (SECOND) OF CONTRACTS §90 cmt. a (1979); Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARVARD L. REV. 678, 678 (1984).

223. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) states: "A promise which the promisor should reasonable expect to induce *action or forbearance* on the part of the promisee. . .and which does induch such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Id.*

224. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a, illus. 1 (out-of-pocket expenses), illus. 3 (changed position) (1979).

225. *E.g.*, *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 984 (8th Cir. 1992) (finding that to show reliance, plaintiff must show that SPD caused plaintiff's decedent not to enroll in Medicare); *Bachelor v. Communications Satellite Corp.*, 837 F.2d 519, 523 n.6 (1st Cir. 1988) (holding that action is required and "a mere expectation is not enough"); *Govoni v. Bricklayers, Masons & Plasterers Int'l Union of Am., Local No. 5 Pension Fund*, 732 F.2d 250, 252-53 (1st Cir. 1984) (finding no reliance on faulty SPD when plaintiff knew about break in service rules for pension plan and retired despite that knowledge, because retirement decision was not final and he could have returned to work to increase his pension); *Santana v. Deluxe Corp.*, 12 F.Supp 2d 162, 178 (D. Mass. 1998) (finding no reliance when plaintiff failed to demonstrate that SPD caused him not to enroll in Medicare Part B); *Moore v. Goodyear Tire & Rubber Co.*, No. Civ.A. 3:95-0873, 1998 WL 917817, at *8 (S.D. W. Va. 1998) (finding that continued employment is not sufficient to establish significant reliance and that frustrated retirement planning does not constitute prejudice); *Adams v. J.C. Penney Co.*, 865 F.Supp. 1454, 1461 (D. Or. 1994) (requiring plaintiff to prove that "he or she did or did not take action resulting in forfeiture of the very benefit sought").

226. *E.g.*, *Rhorer v. Raytheon Eng'rs & Constructors, Inc.*, 181 F.3d 634, 644 n.12 (5th Cir. 1999) (postponing decision of reliance requirement but finding reliance where plaintiff read the SPD and understood it to promise a certain level of life insurance benefits); *Aiken v. Policy Mgmt. Sys.*, 13 F.3d 138, 141 (4th Cir. 1993) (remanding for factual determination of reliance when plaintiff asserted he

relied on an SPD unless he read it before he needed benefits provided under the plan.²²⁷ If the plaintiff asserts an acceptable form of reliance, there must be a casual connection between that reliance and the action the plaintiff takes.²²⁸

However, requiring reliance on a faulty SPD as a basis for recovery is not appropriate in every ERISA case. First, most participants and beneficiaries in employee benefit plans exhibit only nominal understanding and interest in the specific terms of the plan, in the ordinary course of events.²²⁹ Only when the need for coverage arises – as when the participant experiences a medical emergency or a sudden termination of employment necessitating a pension distribution – does the participant scrutinize the SPD for

used SPD in making his decision to resign rather than be involuntarily terminated); *Hansen v. Cont'l Life*, 940 F.2d 971, 983 (5th Cir. 1991) (postponing decision of reliance requirement but finding reliance where plaintiff presented affidavit that he read the SPD and understood it to promise a certain level of spousal life insurance benefits); *McNutt v. J.A. Jones Constr. Co.*, 33 F.Supp 2d 1375, 1380 (S.D. Ga. 1998) (finding reliance when plaintiff averred that he relied on SPD in “making decisions” about disability benefits); *Heise v. Genuine Parts Co.*, 900 F.Supp. 1137, 1149 (D. Minn. 1995) (finding enough evidence of reliance to withstand summary judgment when plaintiff testified he used faulty SPD to help him calculate his disability benefits and used the product of the calculation to help him decide to retire early); *Kaiser Permanente Employees Pension Plan v. Bertozzi*, 849 F.Supp. 692, 699 (N.D. Cal. 1994) (finding sufficient reliance to withstand summary judgment when plaintiff’s decedent wrote an invalid election letter choosing a lump sum pension payment, demonstrating she relied on SPD).

227. *E.g.*, *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51, 55 (1st Cir. 2001) (stating there could be no reliance on faulty SPD when plaintiff did not read it); *Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144, 1149 (7th Cir. 1998) (finding no reliance when plaintiff did not read SPD prior to accident); *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1479 (4th Cir. 1996) (finding no reliance when plaintiff did not receive SPD that failed to disclose pre-existing condition limitation until after he filed claim for long-term disability benefits); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579-80 (11th Cir. 1992) (finding no reliance when no evidence that plaintiff’s decedent read the SPD and his conduct demonstrated no interest in continued health insurance coverage); *Thompson v. Fed. Express Corp.*, 809 F.Supp. 950, 957-58 (M.D. Ga. 1992) (excusing plaintiff’s failure to read SPD at a time when her husband was in the hospital after a car accident and allowing reliance to be demonstrated through plaintiff’s attorneys).

228. *E.g.*, *Freund v. Gerson*, 610 F.Supp. 69, 71-72 (S.D. Fla. 1985) (finding no reliance when plaintiff terminated employment to begin a competing company, not because of a faulty SPD that failed to disclose a pension forfeiture provision).

229. *See, e.g.*, Morton Mintz, *Be Aware of Pension Eligibility Rules Series: FINANCIAL PLANNING*, WASH. POST, Nov. 15, 1987, at R26 (stating “millions of workers don’t understand eligibility requirements for early and regular retirement that are described in their pension plan documents”); Karen Slater, *Retirement Plans that Slowly Melt Away*, WALL ST. J., June 6, 1991, at C1 (suggesting employees should “pay more attention to” retirement plan provisions, especially the plan’s financial health, by reading plan summary annual reports).

an understanding of the plan's terms.²³⁰ Under the reliance doctrine, a participant who only scrutinizes a faulty SPD after the fact usually will not recover.²³¹ Therefore, the reliance approach fails to recognize that a participant may not study the SPD with enough focus to show reliance until he actually needs the coverage, when it is too late.²³² In addition, the participant may never study the SPD at all.²³³

B. *Equitable Estoppel*

Equitable estoppel in faulty SPD cases has three elements: a material misrepresentation, reasonable and detrimental reliance on that misrepresentation, and extraordinary circumstances.²³⁴ The plaintiff bears the burden of proof on all equitable estoppel elements, a burden that is difficult to meet on both material misrepresentation and extraordinary circumstances.²³⁵

230. *E.g.*, Aiken v. Policy Mgmt. Sys., 13 F.3d 138, 141 (4th Cir. 1993) (noting that plaintiff relied on the SPD in making his decision to resign, instead of terminating involuntarily, amidst allegations of sexual harassment); Berry v. Blue Cross Blue Shield of Wash., 815 F.Supp. 359, 360, 365 (W.D. Wash. 1993) (noting that the plaintiff's cancer diagnosis occurred in July 1992 and plaintiffs received the SPD only several months after the annual enrollment period ended).

231. *E.g.*, *supra* note 227.

232. *See* Williams v. Midwest Operating Eng'rs Welfare Fund, 125 F.3d 1138, 1141 (7th Cir. 1997), *rev'd on other grounds by* Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan, 144 F.3d 1014 (7th Cir. 1998). The plaintiff in *Williams* made a claim for medical benefits after a policeman shot him in the leg during a domestic disturbance that the plaintiff initiated. 125 F.3d at 1139. The SPD did not define the word "injury." *Id.* The Plan, however, possibly excluded coverage on the basis of its definition of "injury," because an injury from a domestic disturbance was not an "unintentionally caused unfortunate occurrence." *Id.* at 1141. The court found that reliance was not an issue, because it was nonsensical to conclude that the plaintiff decided how to conduct himself in the altercation with the police officer based on the type of injury coverage he expected from his health insurance plan. *Id.*

233. *See* Maginaro v. Welfare Fund of Local 771, 21 F.Supp 2d 284, 296 (S.D.N.Y. 1998) (recognizing that plan participants learn about plan information from their co-workers or employers, not necessarily from the SPD alone); Ritzer v. Nat'l Org. of Indus. Trade Unions Ins. Trust Fund, 822 F.Supp. 951, 955-56 (E.D.N.Y. 1993) (same).

234. *In Re* Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 58 F.3d 896, 907 (3d Cir. 1995).

235. Only the Third Circuit uses the equitable estoppel standard to resolve faulty SPD claims. In the ten reported appeals court cases in the circuit on this issue, the plaintiff carries the day only once. In *Curcio v. John Hancock Mut. Life. Ins. Co.*, 33 F.3d 226, 239 (3d Cir. 1994), the court granted summary judgment to the plaintiff on her equitable estoppel claim when the defendant distributed faulty SPDs and made oral presentations and repeated assurances about the existence of

First, the plaintiff may have difficulty establishing a material misrepresentation. Courts have not held that a faulty SPD alone is a material misrepresentation in the Third Circuit.²³⁶ Rather, the faulty SPD must be accompanied by other communications, whether written or verbal, that are substantially likely to “mislead a reasonable employee in making an adequately informed decision”²³⁷

The plaintiff may also falter when trying to show extraordinary circumstances. The evidence must show “affirmative acts of fraud or similarly inequitable conduct by an employer, . . . misrepresentations that [arise] over an extended course of dealing between parties, . . . [or] the vulnerability of particular plaintiffs.”²³⁸

Equitable estoppel is an unsatisfactory standard for recovery in faulty SPD cases. Congress expressed its specific intent to require plan sponsors to provide employees with SPDs that are “accurate and comprehensive.”²³⁹ It is contrary to Congress’ intent to require a plan participant to show an extended course of misrepresentation, affirmative fraud, or his own particular vulnerability to recover benefits on the basis of a faulty SPD.²⁴⁰

C. *Strict Liability*

Strict liability is liability without negligence or intent.²⁴¹ Strict liability is not a viable standard of recovery in the faulty SPD cases.

plaintiff’s decedent’s accidental death and dismemberment coverage. In the court’s analysis, it was significant that the plaintiff met with her husband to discuss his accidental death and dismemberment benefit election. *Id.* at 237.

236. *E.g.*, *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co.*, 188 F.3d 130, 134, 151-52 (3d Cir. 1999) (considering SPD together with collective bargaining agreements); *Hein v. Fed. Deposit Ins. Co.*, 88 F.3d 210, 221 (3d Cir. 1996) (considering SPD together with plan actuary’s letter to plaintiff); *In Re Unisys Corp. Retiree Medical Benefit “ERISA” Litigation*, 58 F.3d 896, 907 n.20 (3d Cir. 1995) (considering SPD together with company’s verbal communications that convinced retirees they were entitled to lifetime retiree benefits).

237. *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993).

238. *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co.*, 188 F.3d 130, 152 (3d Cir. 1999) (quoting *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544, 1553 (3d Cir. 1996)).

239. 29 U.S.C. § 1022(a)(1); ERISA § 102(a)(1).

240. *But see* Paul J. Ondrasik, Jr., *Aiken v. Policy Management Systems Corp.—The SPD as Ultimate Trump Card?*, 3 ERISA LITIG. REP. 3, 8 (June 1994) (arguing that equitable estoppel is the best choice for a recovery standard in faulty SPD cases).

241. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 534 (5th ed. 1984).

If it were, the plaintiff should recover without regard to injury, impact or seriousness of the SPD's error. It is simply too harsh to hold plan sponsors strictly liable for errors or omissions in their SPDs. To satisfy ERISA's disclosure requirements, a large company with many benefit plans may publish hundreds of pages of text each year.²⁴² Although the plan sponsor has the duty and obligation to carefully draft and check the text for accuracy, even a potentially significant error that does not result in injury or loss of benefits to a participant should not result in strict liability for the sponsor.

D. Prejudice

"The meaning of prejudice as an alternative to reliance is not clear."²⁴³ Prejudice is defined as injury or damage due to some judgment or action of another, and the resulting detriment.²⁴⁴ Prejudice is nearly universally invoked as an alternative to reliance in the faulty SPD cases.²⁴⁵ However, very few cases actually consider prejudice as a true disjunctive alternative to relief.²⁴⁶

242. *E.g.*, THE ST. PAUL COMPANIES, INC., 2000 BENEFITS BOOK (2000) (on file with author). This Benefits Book is a combined SPD for ten separate ERISA plans and is over 325 pages in length.

243. *Williams v. Midwest Operating Eng'rs Welfare Fund*, 125 F.3d 1138, 1142 n.5 (7th Cir. 1997) *rev'd on other grounds by Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014 (7th Cir. 1998).

244. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1788 (Philip Babcock Gove, Ph.D. ed. 1993).

245. *E.g.*, *Bachelor v. Communications Satellite Corp.*, 837 F.2d 519, 522-23 (1st Cir. 1988) ("[A]ppellees did not show significant reliance *or* even the possibility of prejudice flowing from the SPD.") (emphasis added); *Pierce v. Sec. Trust Life Ins. Co.*, 979 F.2d 23, 30 (4th Cir. 1992) ("[T]here is no factual basis for finding prejudice *or* reliance in this case.") (emphasis added); *Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144, 1149 (7th Cir. 1998) ("Hightshue cannot show reliance, . . . *or* prejudice . . .") (emphasis added); *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 984 (8th Cir. 1992) ("[T]o secure relief on the basis of a faulty summary plan description, the claimant must show some significant reliance on, *or* possible prejudice flowing from the summary.") (emphasis added); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996) (same).

246. *Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144, 1149 (7th Cir. 1998) (finding no prejudice when plaintiff's claim was heard on its merits); *Dodson v. Woodmen of the World Life Ins. Soc'y*, 109 F.3d 436, 439 (8th Cir. 1997) (finding plaintiff was prejudiced when SPD omitted time limit for filing disability benefit claim); *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 142 (4th Cir. 1993) (remanding to district court first for finding of reliance and if reliance is found, no need for district court to inquire about prejudice); *Pierce v. Sec'y Trust Life Ins. Co.*, 979 F.2d 23, 30 (4th Cir. 1992) (finding no prejudice when plaintiffs lost unvested retiree medical benefits); *Govoni v. Bricklayers, Masons & Plasterers Int'l*

Prejudice is a viable standard for recovery in certain circumstances. For example, a plan participant who has died or is seriously ill may be unable to prove that he or she read and relied on the SPD.²⁴⁷ In addition, prejudice is an appropriate standard when an SPD omits terms that could cause a plaintiff to lose benefits altogether (rather than receiving benefits that are different in kind than the plaintiff expected)²⁴⁸. A plaintiff can hardly be expected to allege reliance on a term that was excluded from the SPD, which in some cases is his only source for benefit plan information.²⁴⁹

However, prejudice should be carefully applied. Nearly every plaintiff in faulty SPD cases could claim some injury. For example, the plaintiffs in *Bachelder v. Communications Satellite Corp.* were in fact injured – they received less ESOP distribution proceeds than they expected.²⁵⁰ However, the courts are unsatisfied with expectation providing the basis for injury, and perhaps rightly so.²⁵¹ Expectation is simple to allege and subject to no reasonability requirements. Just as strict liability sets the bar too high for employers, a standard that allows relief on the basis of expectation alone would expose employee benefit plans to easily asserted claims. Such claims would be difficult to disprove, and plans'

Union of Am., Local No. 5 Pension Fund, 732 F.2d 250, 252-53 (1st Cir. 1984) (finding no prejudice when plaintiff could have received higher pension benefits had he delayed his retirement); *Manginaro v. Welfare Fund of Local 771*, 21 F.Supp 2d 284, 296 (S.D.N.Y. 1998) (allowing plaintiff to prevail by showing either reliance or prejudice and analyzing omission of short claim filing deadline under prejudice standard); *Ritzer v. Nat'l Org. of Indus. Trade Unions Ins. Trust Fund*, 822 F.Supp. 951, 955 (E.D.N.Y. 1993) (holding that plaintiff must show a "high probability of prejudice" as a result of a faulty SPD).

247. *Ritzer v. Nat'l Org. of Indus. Trade Unions Ins. Trust Fund*, 822 F.Supp. 951, 955 (E.D.N.Y. 1993). The court very astutely notes that it would be difficult, if not impossible, for the participant's estate to prove that the participant, when alive, read the SPD and relied upon it. *Id.*

248. *Manginaro v. Welfare Fund of Local 771*, 21 F.Supp 2d 284, 296 (S.D.N.Y. 1998). An undisclosed claim filing period could cause a participant to lose benefits altogether. SPDs are required to disclose "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits. . . ." 29 U.S.C. § 1002(b), ERISA § 102(b). A time limitation on filing benefit claims is certainly a circumstance that could result in loss of benefits.

249. *E.g.*, *Dodson v. Woodmen of the World Life Ins. Soc'y*, 109 F.3d 436, 439 (noting "[t]he SPD was the only document describing the group policy that Dodson had ever received").

250. 837 F.2d 519, 523 n.6 (1st Cir. 1988).

251. *Id.*, *see also* *Boucher v. Williams*, 13 F.Supp 2d 84, 102 (D. Me. 1998) (quoting *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 523 (1st Cir. 1988)).

continued financial health and strength would suffer.

V. RECOMMENDATIONS

The courts' patchwork approach to the reliance or prejudice question results in different standards of recovery in different federal circuits, a result that is inconsistent with the purpose of ERISA.²⁵² A uniform standard of recovery would provide like treatment of similarly situated plaintiffs and would result in increased certainty for employers.²⁵³

First, some form of reliance or prejudice should be required in all circuits. The Sixth Circuit's strict liability approach is a significantly reduced standard that may encourage plaintiffs to seek that forum, if possible, to litigate faulty SPDs. Plaintiffs would be particularly likely to seek the Sixth Circuit as a forum when they are unable to truthfully assert reliance or prejudice on the faulty SPD. The possibility that these plaintiffs could succeed places too heavy a burden on employers, who must publish SPDs to comply with ERISA, but who should not be held strictly liable for minor errors in their SPDs. Similarly, the Third Circuit's equitable estoppel approach places too heavy a burden on plaintiffs. The "extraordinary circumstances" hurdle²⁵⁴ places recovery from a faulty SPD out of the hands of most plaintiffs.

Next, the nature of reliance itself should be flexible enough to fit the plaintiff's situation. As discussed above, reliance takes many forms, depending upon the forum.²⁵⁵ Reliance may mean proof of the impossible, as in *Berry v. Blue Cross Blue Shield of Washington*.²⁵⁶ The *Berry* plaintiff had to show she decided not to purchase other health insurance in reliance on an SPD's inaccurate representation of coverage for bone marrow transplants *before she even received the SPD*. Reliance may also mean a mere demonstration of reading the SPD and understanding it to provide a certain benefit, whether that understanding was reasonable or unreasonable. A flexible reliance

252. 29 U.S.C. § 1001(b), ERISA § 101(b) articulates as part of ERISA's policy the setting of "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans," and immediately thereafter provides for "appropriate remedies, sanctions, and ready access to the Federal courts." *Id.*

253. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (articulating Fourteenth Amendment's direction that "all persons similarly situated should be treated alike").

254. *See supra* note 238.

255. *See supra* notes 225-227.

256. 815 F.Supp. 359, 365 (W.D. Wash. 1993).

standard first could accommodate the *Berry* plaintiff, who made a treatment decision rather than a coverage decision based on the information available to her and her doctor at the time of her serious illness.²⁵⁷ Such a standard next would encourage employers to carefully scrutinize their SPDs for errors, without extending liability to situations where plaintiffs experience no injury. Finally, this standard would easily accommodate the existing “read and relied” cases where the plaintiff may provide an affidavit that he read the SPD and relied on it when making his benefit decisions.²⁵⁸

Finally, cases should be analyzed under both the reliance and the prejudice standards. Prejudice is a viable standard for recovery and should not be omitted from the court’s analysis.

Reliance and prejudice are necessarily fact-driven inquiries. However, a flexible reliance standard, combined with a consistent application of the disjunctive reliance OR prejudice formulation, will go a long way toward assuring justice for all plaintiffs and plan sponsors who are embroiled in a struggle about an SPD, intended to be the participant’s main source of benefits information, that contains an error, inconsistency, or omits a critical term.

257. See *Williams v. Midwest Operating Eng’rs Welfare Fund*, 125 F.3d 1138, 1141 (7th Cir. 1997), *rev’d on other grounds by Mers v. Marriott Int’l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014 (7th Cir. 1998) (noting that “reliance can occur, not at the time of the pre-injury conduct, but at the time the claim is made if the circumstances and nature of the claim evidence reliance on the summary language”).

258. See *supra* note 227.