

# ACCURACY IS NOT A LOT TO ASK: DECISIONS IN THE SECOND AND THIRD CIRCUITS SET THE TONE FOR LITIGATION OVER CONFLICTS BETWEEN ERISA PLAN DOCUMENTS AND SUMMARIES

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## I. Introduction

Since the enactment of the Employee Retirement Income Security Act (ERISA)<sup>1</sup> in 1975, the common law surrounding its disclosure requirements has both clarified and, in some cases, complicated the distribution of rights and obligations under the Act.<sup>2</sup> Courts recognize that appropriate plan disclosure is an essential element of the statute and have upheld suits brought by plan participants and beneficiaries aimed at enforcing the disclosed terms of a benefit plan.<sup>3</sup> The circuit courts are unified in ruling that terms of the Summary Plan Description (SPD),<sup>4</sup> an

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<sup>1</sup> *See generally* Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2004).

<sup>2</sup> *See, e.g.*, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (explaining that “courts are to develop a ‘federal common law of rights and obligations under ERISA-regulated plans.’” (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987))). *See also* *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

<sup>3</sup> *See* *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994) (“Adequate disclosure to employees is one of ERISA’s major purposes.”). *See also* *Layout v. Xerox Corp.*, 238 F.3d 205, 211 (2d Cir. 2001) (“[E]mployees are entitled to rely on the SPDs as their primary source of information about their benefits.”).

<sup>4</sup> 29 U.S.C. § 1022(a) mandates that the summary plan description “shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.” Section 1022(b) delineates the specific items that must be addressed in the SPD, the most important of which for the topic at hand are “circumstances which may result in disqualification, ineligibility, or denial or loss of benefits . . . .” Corresponding federal regulations provide a more

overview document that describes plan benefits and obligations in lay terms, override conflicting terms in the Plan Document (Plan), the more complex and comprehensive document typically written in professional jargon. Employees who participate in ERISA-sponsored welfare or pension plans usually receive a copy of the SPD and not the lengthy Plan Document itself.<sup>5</sup> Courts recognize that because employees have only these summaries to consult before making important decisions regarding employment, health care, and retirement,<sup>6</sup> the summaries should be written accurately, distributed promptly, and made binding not only on the plan participant, but on the Plan and its administrators as well.<sup>7</sup> However, the same courts disagree about what elements are necessary to succeed on a claim for benefits denied or otherwise withheld. Thus, the circuit in which a claim is brought determines whether a plaintiff must show some form of reliance, detriment, or a combination of the two as a result of a conflict between an SPD provision the Plan language.

Congress declared that one of its goals in enacting ERISA was “to protect ... the interests of participants in employee benefit plans and their beneficiaries[] by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.”<sup>8</sup> A Bureau of Labor Statistics study shows that in the year 2000, 52 % of private sector workers received company-sponsored medical benefits, and 48 %

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detailed list of items required in an SPD, 29 C.F.R. § 2520.102-3, and specify the manner in which they are to be presented, 29 CFR § 2520.102-2.

<sup>5</sup> See 29 U.S.C. § 1021(a) (“The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan-- (1) a summary plan description described in section 1022(a)(1) of this title.”).

<sup>6</sup> See *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. Research Found.*, 334 F.3d 365, 379 (3d Cir. 2003) (“The SPD is the document to which the lay employee is likely to refer in obtaining information about the plan and in making decisions affected by the terms of the plan.”). See also *Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050, 1051 (7th Cir. 1991) (“Nothing in ERISA requires that the insurance policy summarized in the summary plan document be given the insured.”).

<sup>7</sup> See *Burstein*, 334 F.3d 365.

<sup>8</sup> 29 U.S.C. § 1001(b) (2004).

received some form of company-sponsored retirement benefits.<sup>9</sup> These numbers translate into millions of workers participating in ERISA-governed benefit plans. In ERISA, Congress declares that it is these workers whom the law is intended to protect, and that it is the courts to whom aggrieved workers may turn to hold employers accountable not only to the law, but also to the independent benefit plans such employers create and administer. Recent decisions in *Burstein v. Retirement Account Plan for Employees of Allegheny Health Education Research Foundation*<sup>10</sup> and *Burke v. Kodak Retirement Income Plan*<sup>11</sup> echo this intent and reinforce the resolve of circuit courts across the country to enforce terms of the SPD over the terms of the Plan itself when the two documents conflict. However, these decisions also illustrate the courts' inability to agree about the criteria necessary for a successful suit. To varying degrees, both *Burke* and *Burstein* signal a shift away from the common law imposition of technical requirements involving a showing of reliance and/or prejudice. *Burke* does so by mandating a presumption of prejudice on behalf of the plan participant; *Burstein* goes one step further, obviating the need to prove or plead any reliance upon or resulting prejudice from the SPD in order to succeed on an action to enforce the conflicting terms of the SPD over those of the Plan.

This article will discuss the circuit courts' enforcement of the SPD terms over the terms of the Plan; it will analyze the issues of reliance on, and resulting prejudice from, a deficient SPD; it will show how other circuit courts have resolved this issue; and it will draw conclusions regarding how to comply with ERISA when drafting an SPD such that it sufficiently reflects the intentions and benefits of the Plan itself.

## II. Recent Holdings in the Second and Third Circuits

In *Burstein*, former employees of the nonprofit Allegheny Health Education and Research Foundation (AHERF) sought benefits allegedly owed them under the company's Retirement Account Plan after that company filed for bankruptcy. The Plan, defined as a cash balance plan,<sup>12</sup> held benefits in trust for its employees and was

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<sup>9</sup> BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES 2000, at 1 (2002) available at <http://www.bls.gov/ncs/ebs/sp/ebnr0007.pdf>.

<sup>10</sup> 334 F.3d 365 (3d Cir. 2003).

<sup>11</sup> 336 F.3d 103 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004).

<sup>12</sup> Writing for the court, Circuit Judge Garth included the Employee Benefits Security Administration's description of a cash balance plan, explained on the U.S. Department of Labor's website as follows:

sufficiently funded for its vested employees.<sup>13</sup> The controversy arose out of language concerning the Plan's termination. The SPD stated: "[i]f the Plan is terminated you will *automatically become vested* in your account, *regardless of how many years of service* you have earned."<sup>14</sup> However, the Plan read: "Upon the termination or partial termination of the Plan, the right of all affected participants to benefits accrued to the date of such termination or partial termination shall become nonforfeitable (within the meaning of Treas. Reg. § 1.411(a)-4) *to the extent funded* as of such date."<sup>15</sup> After AHERF declared bankruptcy, its employees discovered that the company had funded the Plan at the minimum level permitted under ERISA, with funds available only for those employees whose benefits had already vested by virtue of the five-year requirement.

Burstein, and other similarly affected former employees with fewer than five years of service, filed suit in district court alleging claims to plan benefits, equitable estoppel, and breach of fiduciary duty. The claimants also sought class certification. The district court dismissed all claims for failure to state a claim upon which relief could be granted and denied the motion for class certification as moot.

The district court based its grant of the defendants' motion to dismiss on the Third Circuit's holding in *Gridley v. Cleveland Pneumatic Co.*<sup>16</sup> In that case, the plaintiff

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While both traditional defined benefit plans and cash balance plans are required to offer payment of an employee's benefit in the form of a series of payments for life, traditional defined benefit plans define an employee's benefit as a series of monthly payments for life to begin at retirement, but cash balance plans define the benefit in terms of a stated account balance. *These accounts are often referred to as hypothetical accounts because they do not reflect actual contributions to an account or actual gains and losses allocable to the account.*

*Burstein*, 334 F.3d at 370 n.6 (emphasis in original).

<sup>13</sup> According to the Plan, vested employees were those who had worked at least five years with AHERF. It was undisputed that the SPD and other brochures distributed by AHERF to its employees adequately reflected that requirement.

<sup>14</sup> *Burstein*, 334 F.3d at 375 (emphasis in original).

<sup>15</sup> *Id.* at 376 (emphasis in original).

<sup>16</sup> 924 F.2d 1310, 1318 (3d Cir. 1991). In *Gridley*, a widow attempted to collect on her deceased husband's life insurance policy, relying on statements made in an overview brochure. Gridley contended that the overview brochure was a defective SPD and as such she was entitled to collect "appropriate equitable relief" under ERISA (29 U.S.C.A. § 1132(a)(3)). The *Gridley* court disagreed and ruled that the overview brochure was not an SPD and in fact made an internal reference to the

asserted that because the term “plan” was not specifically defined in ERISA, the court should interpret the SPD as one of its defining documents. The *Gridley* court disagreed with this assertion and instead found that the term was articulated in the statute:

In Section 3(3), 29 U.S.C. § 1002(3), the term “plan” is defined as “an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare plan and an employee pension benefit plan.” This definition clearly does not encompass a summary plan description and, accordingly, *Gridley* could not recover under 29 U.S.C. § 1132(a)(1)(B)<sup>17</sup> for benefits allegedly due under a summary plan description.<sup>18</sup>

Citing *Gridley*, as well as *Crane v. Asbestos Workers Phila. Pension Plan*,<sup>19</sup> the district court in *Burstein* determined that “Claims for benefits under § 1132(a)(1)(B) are determined by the explicit terms of the plan’s formal governing instrument. Thus, under § 1132(a)(1)(B), employees cannot recover from the Plan benefits which are allegedly granted or due under a summary plan description or other secondary document.”<sup>20</sup> The Third Circuit disagreed with the district court’s reasoning; it classified its earlier discussion of the role of the SPD in *Gridley* as dictum, not binding upon the district court to follow as precedent.<sup>21</sup>

Thus liberated, the *Burstein* court ruled: “[t]oday, we join with the other Courts of Appeals that have considered this issue, and hold that, where a summary

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SPD, such that “a reasonable reader could not have concluded, that the new overview brochure itself was a summary plan description.”

<sup>17</sup> 29 U.S.C. § 1132(a)(1)(B) states, “A civil action may be brought (1) by a participant or beneficiary (B) 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.”

<sup>18</sup> *Gridley*, 924 F.2d at 1318.

<sup>19</sup> *Crane v. Asbestos Workers Phila. Pension Plan*, No. CIV.A. 95-4173, 1998 WL 151801, at \*3 n.8 (E.D.Pa. Apr. 1, 1998) (in which the district court cited *Gridley* as deciding that claims for benefits “are ordinarily governed by a plan’s formal governing instrument rather than its summary plan description.”).

<sup>20</sup> *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. and Research Found.*, 263 F.Supp.2d 949, 960 (E.D. Pa. 2002) (citations omitted), *rev’d*, 334 F.3d 365 (3d Cir. 2003).

<sup>21</sup> *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. and Research Found.*, 334 F.3d 365 (3d Cir. 2003).

plan description conflicts with the plan language, it is the summary plan description that will control.”<sup>22</sup> The court went one step further, concluding that “a plan participant who seeks to claim plan benefits on the basis of a conflict between an SPD and a plan document need not plead reliance on the SPD.”<sup>23</sup> On this point the circuits are far less consistent.

The Second Circuit has also considered the issue of a deficient SPD. In *Burke v. Kodak Retirement Income Plan*,<sup>24</sup> the widow of a Kodak employee attempted to collect Survivor Income Benefits (SIB) after her husband passed away. When the company denied her claim, Mrs. Burke sued the retirement plan administrators to recover money allegedly owed to her under the terms of the Plan.

Although the Burkes were married for less than one year, they had lived together as domestic partners for eight years. The plan required married couples to have been married for at least one full year for a surviving spouse to become eligible for benefits. Alternatively, “[t]he plan and sixteen sections of the SPD explicitly require ‘domestic partners’ to file a joint affidavit on a form provided by the Plan Administrator if they wish to be eligible for various types of benefits. Significantly, the section of the handbook that deals with SIB fails to mention the affidavit requirement.”<sup>25</sup> The Burkes never filed a joint affidavit. Mrs. Burke contended that because the affidavit requirement was omitted from the section of the SPD dealing with SIB though it was included in sixteen other sections, she was entitled to those benefits even though the language of the Plan explicitly stated that no benefits would be paid unless the affidavit requirement had been satisfied.

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<sup>22</sup> *Id.* at 378. The other appellate court decisions to which this phrase refers are: *Heidgerd v. Olin Corp.*, 906 F.2d 903 (2d Cir. 1990); *Pierce v. Sec. Trust Life Ins. Co.*, 979 F.2d 23 (4th Cir. 1992); *Hansen v. Cont’l Ins. Co.*, 940 F.2d 971 (5th Cir. 1991); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134 (6th Cir. 1988); *Senkier v. Hartford Life & Acc. Ins. Co.*, 948 F.2d 1050 (7th Cir. 1991); *Barker v. Ceridian Corp.*, 122 F.3d 628 (8th Cir. 1997); *Atwood v. Newmont Gold Co.*, 45 F.3d 1317 (9th Cir. 1995); *Chiles*, *infra* note 58, at 1505 (10th Cir. 1996); and *McKnight v. S. Life & Health Ins. Co.*, 758 F.2d 1566 (11th Cir. 1985). *Id.* n.18. The First Circuit and D.C. Circuit have not specifically addressed this issue. However, the First Circuit, in *Govoni v. Bricklayers, Masons and Plasterers Int’l Union of America, Local No. 5 Pension Fund*, 732 F.2d 250 (1st Cir. 1984) has implied that the SPD would govern.

<sup>23</sup> *Burstein*, 334 F.3d at 380.

<sup>24</sup> 336 F.3d 103 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004).

<sup>25</sup> *Id.* at 106.

In 1990, the Second Circuit held in *Heidgerd v. Olin Corp.*,<sup>26</sup> that where the Plan and the Booklet are in conflict, the Booklet controls.<sup>27</sup> The *Burke* court, acknowledging this decision, rephrased its holding more accurately in ERISA jargon, stating: “[w]here the terms of a plan and the SPD conflict, the SPD controls.”<sup>29</sup>

The *Burke* court then considered the issue of whether the Burkes’ reliance or lack thereof on the SPD should play a role in the court’s determination of whether or not to award SIB to Mrs. Burke. The district court found “no evidence that plaintiff or her husband detrimentally relied upon the plan. In fact, plaintiff testified that she never reviewed the SPD, and that her husband’s decision not to list her as a domestic partner was an affirmative decision so as not to jeopardize health insurance coverage.”<sup>30</sup> While the Second Circuit apparently agreed with the district court’s findings on absence of reliance, it proceeded to establish a new standard upon which to consider the weight of those findings, stating, “we now adopt a prejudice standard; and we find that the Burkes were prejudiced as a matter of law.”<sup>31</sup> The court clarified this prejudice requirement later in the decision. “Cognizant of ERISA’s distribution of benefits, we require, for a showing of prejudice, that a plan participant or beneficiary was *likely* to have been harmed as a result of a deficient SPD. Where a participant makes this initial showing, however, the employer may rebut it through evidence that the deficient SPD was in effect a harmless error.”<sup>32</sup> Although this “likely prejudiced” standard does not go as far as *Burstein* in allowing a plan participant to succeed on a claim against his or her Plan, it does provide plaintiffs with a helpful tool in establishing a *prima facie* case.

### III. SPD v. Plan: Which Document Governs When the Two Conflict?

As noted above, since the passage of ERISA, courts have come to agree that an SPD is an official ERISA-governed document that will control when it conflicts

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<sup>26</sup> 906 F.2d 903 (2d Cir. 1990).

<sup>27</sup> *Id.* (“In a Memorandum of Decision dated September 22, 1988... the court ruled that the Booklet was a ‘plan summary’ within the meaning of ERISA, 29 U.S.C. § 1022, and that ERISA thus governed review of the denial of benefits.”).

<sup>29</sup> *Burke*, 336 F.3d at 110.

<sup>30</sup> *Burke v. Kodak Ret. Income Plan*, 217 F.Supp.2d 384, 390 (W.D.N.Y. 2002), *rev’d*, 336 F.3d 103 (2d Cir. 2003).

<sup>31</sup> *Burke*, 336 F.3d at 111-12.

<sup>32</sup> *Id.* at 113 (emphasis in original).

with terms of the official Plan Document.<sup>33</sup> However, courts tend to require a clear showing of conflict between the two documents before making a determination that one supercedes the other. In situations where the Plan merely clarifies a provision of the SPD, judges tend to defer to the interpretation of plan administrators. Similarly, courts typically refuse to consider an SPD's silence on an issue that is discussed clearly in the Plan as rising to the required level of conflict.<sup>34</sup>

As indicated in the *Burke* discussion, the failure of an SPD to mention a requirement for SIB, while consistently including the same requirement with respect to numerous other types of benefits, satisfied the court's idea of a substantive conflict and led to a determination of a deficient SPD. But would the court's ruling have been different if the requirement was not so consistently mentioned in other parts of the SPD? Most likely the answer would be yes. Two earlier cases from other circuits shed some light on how to interpret an SPD's silence with regard to an explicit provision of the Plan.

In *Jensen v. SIPCO, Inc.*,<sup>35</sup> the Eighth Circuit took up the question of how to interpret a Plan's apparent vesting of retiree welfare benefits in light of a more recent Plan decision to charge premiums to certain retired participants.<sup>36</sup> While this case dealt largely with issues outside the scope of the present article, it provides insight on how to interpret silence in an SPD in light of explicit Plan provisions and other extrinsic evidence. The court looked at two pre-1989 SPDs for provisions entitled "Termination of Coverage," which provided that coverage would be terminated upon death of the pensioner, divorce of one's spouse, and for children who marry or

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<sup>33</sup> See *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. and Research Found.*, 334 F.3d 365, 378 (3d Cir. 2003). See also *supra* note 22.

<sup>34</sup> See *Mers v. Marriot Int'l Group Accidental Death and Dismemberment Plan*, 144 F.3d 1014, 1023 (7th Cir. 1998) ("an SPD's silence on an issue does not estop a plan from relying on the more detailed policy terms when no direct conflict exist [SIC]") (citing *Herrmann v. Cencom Cable Assocs., Inc.*, 978 F.2d 978, 983 (7th Cir. 1992)). See also *Sprague v. Gen'l Motors Corp.*, 133 F.3d 388 (6th Cir. 1998); *Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201 (4th Cir. 1997).

<sup>35</sup> 38 F.3d 945 (8th Cir. 1994).

<sup>36</sup> *Id.* at 949, 952. ERISA requires that retiree pension plans disclose vesting requirements. However, it does not make the same requirement of retiree welfare plans. Thus, "a pension plan SPD *must* disclose its vesting terms, but a welfare plan SPD is not required to disclose that plan benefits are not vested. Rather, § 1022(b) only expressly requires that a welfare plan SPD specify those circumstances in which an individual beneficiary is not entitled to benefits otherwise provided by the present terms of the plan." *Id.* at 952.

turn 19 (whichever occurs first).<sup>37</sup> The SPDs made no mention of any other situation in which a retiree might lose vested welfare benefits as required by 29 U.S.C. § 1022(b).<sup>38</sup> The court noted, however, that these clauses “can also be construed as dealing only with termination of coverage on an individual basis, not the separate questions of whether the Plan may be terminated or its benefit levels modified by SIPCO.”<sup>39</sup> Absent from these SPDs was any reservation of rights for the Plan to unilaterally change its terms.<sup>40</sup> An SPD issued in 1989 included a generic reservation of rights clause; a subsequent SPD issued a few months later included a reservation of the right to charge a premium for health benefits. The retirees “argue[d] that the ‘TERMINATION OF COVERAGE’ provision in the Plan SPDs promised vested benefits when they stated that benefits *will be* provided until the retiree dies, or a spouse divorces, or a child marries or reaches age 19.”<sup>41</sup> The court found the termination of coverage statement in the SPD to be ambiguous in that while it identified only three scenarios in which coverage would be terminated, the plan did not specifically state that retiree welfare benefits were vested. Therefore, the court looked to extrinsic evidence to determine the plan drafters’ intent. In doing so, the court did not disregard provisions of the SPD; rather, it relegated the place of the SPD to a mere “part of the interpretive landscape.”<sup>42</sup> The court stated, “this rule of construction [that an SPD provision trumps a conflicting Plan provision] does not apply when the plan document is specific and the SPD is silent on a particular matter.”<sup>43</sup> However, in this instance the plan was neither completely specific nor the SPD wholly silent.<sup>44</sup> The court found that plan drafters did intend for these benefits

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<sup>37</sup> *Id.* at 949.

<sup>38</sup> 29 U.S.C. § 1022(b) provides a list of items that must be included in an SPD, among them, “circumstances which may result in disqualification, ineligibility, or denial or loss of benefits.”

<sup>39</sup> *Jensen*, 38 F.3d at 950.

<sup>40</sup> The Plans summarized by these SPDs, however, did include reservation of rights clauses granting the Plan authority to “alter, amend, or annul any of the provisions” of the medical plan. *Id.* at 948. Plan Administrators argued that this clause in the Plan had no contradictory provision in the SPD and therefore should govern the Plan.

<sup>41</sup> *Id.* at 950.

<sup>42</sup> *Id.* at 953. Once the court looked to other evidence to determine the intent of plan drafters, it determined that the drafters did intend retiree welfare benefits to vest. Accordingly, it found in favor of the retirees.

<sup>43</sup> *Id.* at 952. *See also* *Wise v. El Paso Natural Gas Company*, 986 F.2d 929 (5th Cir. 1993).

<sup>44</sup> *Jensen*, 38 F.3d at 950. The court found that the Plan’s reservation of the right to amendment was ambiguous because it left “at least some doubt as to whether SIPCO intended to reserve the right to

to become vested, and it ruled in favor of the employees. This case illustrates a court's willingness to venture outside a Plan's formal written documents to ascertain the intent of its drafters. *Jensen* essentially holds that a claimant's interpretation of an ambiguous provision in an SPD which is contested by plan administrators will not be enforced absent a significant showing of intent on the part of the Plan drafters.

In *Wise v. El Paso Natural Gas Co.*, the defendant, after being acquired by Burlington Northern, Inc., decided to change its practice of providing full healthcare benefits to retired workers.<sup>45</sup> Aware of potential legal implications of changing plan terms to limit or reduce benefits without having reserved the right to make such changes in the summary, the company issued new SPDs in 1985 that specifically reserved that right.<sup>46</sup> Subsequently, the company gave notice of its intention to end its practice of providing fully paid healthcare for employees who retired after March 1, 1986. The plaintiffs, former employees of El Paso who retired after March 1, claimed to have been improperly denied welfare benefits and, accordingly, filed suit under 29 U.S.C. section 1132(a)(1)(B).

The Fifth Circuit ruled in favor of the defendant, due in large part to the fact that the company followed the ERISA-prescribed scheme for amending a Plan and issued new SPDs in a timely fashion. The plaintiffs argued that the court should recognize their welfare benefits (fully paid health insurance upon retirement) as vested. They relied on a phrase in El Paso's pre-1985 SPDs for this proposition: "[u]pon retirement, you, your spouse, and eligible children under 19 years of age are automatically insured for retirement health care benefits and the Company pays the entire cost."<sup>47</sup> The plaintiffs pointed to the absence of any provision in El Paso's pre-1985 SPDs that restricted this promise, and argued that the company essentially relinquished its right ever to charge a premium for retiree health benefits. However,

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change or terminate benefits to already retired pensioners, or only the right to make prospective changes for those covered by the Plan but not yet retired." However, the court also remarked of the SPD that the termination of benefits clause found therein was "at most an ambiguous expression of an intent to vest retiree benefits." *Id.*

<sup>45</sup> *Wise*, 986 F.2d at 933.

<sup>46</sup> *Id.* at 933. SPDs issued by El Paso in March and June of 1985 included the following provision: "The Company reserves the right to alter, amend, delete, cancel or otherwise change the plan or any of the provisions of the plan at anytime [sic]. If the plan is terminated, coverage for you and your eligible family members will end"

<sup>47</sup> *Id.* at 932.

ERISA does not require disclosure of a Plan's right to amend its terms,<sup>48</sup> and thus the company's amended 1985 SPDs provided fair notice of the imminent changes. The court refrained from imposing requirements where Congress had not, finding that "El Paso's failure to include that which ERISA does not require cannot act to prejudice El Paso by imposing an infinite duty."<sup>49</sup>

The plaintiffs in *Wise* next argued for enforcement of the pre-1985 provision in terms of a contractual obligation undertaken by El Paso to provide its employees with vested health benefits upon retirement. However, the court found little evidence for this assertion outside the single provision in the SPD, which provision was ambiguous at best. "While clear and unambiguous *statements* in the summary plan description are binding, the same is not true of silence. There is nothing in the way of context, inference, or presumption to persuade us otherwise."<sup>50</sup> By making a contractual argument as opposed to a statutory one, the plaintiffs essentially raised the evidentiary bar, requiring an even greater showing of intent on the part of the plan drafters to vest retirees in their health benefits. As the claimants could produce nothing beyond the SPD's silence on the issue, this argument, too, was unpersuasive.

The issue presented in both *Jensen* and *Wise*, whether the vesting of health benefits upon retirement was intentional or not, is only one of many major issues that can arise from an improperly drafted SPD. In both cases, the mere omission of a reservation of rights clause led to extensive litigation and, in the case of *Jensen*, a verdict in favor of the plaintiffs. Another issue of concern when establishing whether a conflict exists between an SPD and a Plan Document is whether terms used in an SPD differ from their ordinary, everyday meanings. This scenario can be particularly troublesome in light of the technical language used to discuss modern healthcare.

The Fourth Circuit Court examined just what constitutes a conflict between an SPD and a Plan Document in *Hendricks v. Central Reserve Life Insurance Company*.<sup>51</sup>

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<sup>48</sup> *Id.* at 934 ("It is undisputed that nothing in ERISA requires an SPD to reference amendment rights or procedures."). The court found that ERISA section describing the content of SPDs, 29 U.S.C. § 1022(b), which requires SPDs to include anything that may restrict benefits, applies only to individual employees under the current terms of the plan, not to modifications to the plan as a whole. Thus, plan administrators are free to amend the terms of the plan, even if it abrogates or diminishes non-vested employee benefits, as long as they follow the ERISA-prescribed scheme for doing so. Vested benefits, obviously, cannot be reduced due to a plan amendment.

<sup>49</sup> *Id.* at 937.

<sup>50</sup> *Id.* at 938 (emphasis in original).

<sup>51</sup> 39 F.3d 507 (4th Cir. 1994).

After being diagnosed with small cell lung cancer, David Hendricks decided to undergo a new procedure called “high-dose chemotherapy and peripheral stem cell rescue.”<sup>52</sup> He requested pre-approval from Central Reserve (his health insurance provider) for coverage of the treatment. Central Reserve denied this request, noting that the procedure was still considered “experimental/investigational” and pointing to the policy’s express exclusion of coverage of those types of procedures. Hendricks decided to undergo the treatment anyway and filed suit against Central Reserve for denying him benefits. Hendricks argued that he was prejudiced by a conflict between the company’s SPD and its official Plan Document. The SPD provided no definitions for the words “experimental” and “investigative” while the official Plan Document did provide them. The company used the definitions provided in the Plan Document to make a determination of benefits. Thus, Hendricks argued, this case should fall within the parameters set out in *Aiken v. Policy Management Systems Corporation*.<sup>53</sup> However, the court did not agree that a conflict existed between the two documents. “Whether the court utilizes the plan itself or just the summary, it makes no difference, because if only the summary is used, the ordinary . . . meaning of those terms would be utilized, and they are not inconsistent with the plan document itself.”<sup>54</sup> Because the court was determined that no substantive conflict arose between the SPD and the Plan, Hendricks was barred from succeeding on a section 1022 claim.<sup>55</sup>

In its decision not to apply *Aiken*, the court seemed to establish certain criteria about the relationship between an SPD and a Plan Document when the conflict is not one of substance but simply one of omission. Because an SPD is a summary, it is by its own nature forced to leave out specific information in the interest of brevity. However, at what point does an omission become a conflict? The court noted, “if we were to find that the generally accepted definitions of ‘experimental’ and ‘investigative’ as used in the summary plan description differed substantially from the definitions of those terms given in the official plan document, the resulting conflict might require us to apply our *Aiken* line of cases.”<sup>56</sup> This ruling

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<sup>52</sup> *Id.* at 508.

<sup>53</sup> 13 F.3d 138 (4th Cir. 1993) (in which the Fourth Circuit ruled that the SPD will supercede the Plan Document in situations where the two conflict).

<sup>54</sup> *Hendricks*, 39 F.3d at 512. In its decision, the court provides dictionary as well as Plan Document definitions of the terms in question.

<sup>55</sup> *See also* *Martin v. Blue Cross & Blue Shield of Virginia, Inc.*, 115 F.3d 1201 (4th Cir. 1997) (in which a patient seeking the same treatment as Hendricks made a similar argument with the same result).

<sup>56</sup> *Hendricks*, 39 F.3d at 512.

suggests that courts will most likely require a clear showing of conflict before allowing a claim to proceed to trial. Without such a clear showing of conflict, courts are unwilling to interfere with plan administrators' interpretation of the provisions of the plan.

However, once a material conflict between an SPD and the Plan it summarizes has been established, courts agree that the SPD should be the controlling document. They have noted a few different factors behind this rationale. Many jurisdictions base it upon the "sufficiently accurate and comprehensive" requirement articulated in 29 U.S.C. § 1022, the section of ERISA describing SPDs.<sup>57</sup> Thus, in the plain language of the law, if the terms of the SPD are ambiguous, it is inherently deficient because it has not been drafted so as to comport with the statute.

Other courts, like the Eleventh Circuit in *Chiles v. Ceridian Corporation*,<sup>58</sup> base their decisions on plain common sense and fairness. For example, the *Chiles* court stated that "[b]ecause the SPD best reflects the expectations of the parties to the plan, the terms of the SPD control the terms of the plan itself."<sup>59</sup> The *Chiles* court recognized that ordinary employees typically have neither the time nor the familiarity with legal and medical terminology required to wade through hundreds of pages of technical jargon in order to understand their benefit packages. Nor should they be required to do so when Congress has mandated that employers provide them with an accurate and comprehensive SPD. The *Burstein* court reinforced this idea by pointing to the "relative inaccessibility of AHERF's Plan Document."<sup>60</sup> In *Burstein*, only the SPD and not the Plan Document was distributed to employees. In addition, an employee could only obtain a copy of the Plan Document by written request (including a small fee) or view it at the company's Benefit Service Center.<sup>61</sup> Requiring

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<sup>57</sup> See *Atwood v. Newmont Gold Co., Inc.*, 45 F.3d 1317, 1321 (9th Cir.1995) (in which the Ninth Circuit explained, "[w]e have interpreted § 1022(b) to mean that the SPD 'must be specific enough to enable the ordinary employee to sense when there is a danger that benefits could be lost or diminished.'" (quoting *Stahl v. Tony's Bldg. Materials, Inc.*, 875 F.2d 1404, 1408 (9th Cir.1989))).

<sup>58</sup> 95 F.3d 1505 (11th Cir. 1996).

<sup>59</sup> *Id.* at 1515.

<sup>60</sup> See *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. and Research Found.*, 334 F.3d 365 (3d Cir. 2003).

<sup>61</sup> The record in *Burstein* describes a very inaccessible plan document. It is not known, nor do the authors intend to purport, whether or not this level of inaccessibility is commonplace among employers or if AHERF is a special case. However, it does seem to be the common practice among employers to distribute SPDs and to make the Plan Documents available only upon request.

employees to consult the official Plan document before making an informed decision regarding their health or pension plans would indeed be an unjustifiable burden. It would also render the summary meaningless, as employees would be forced to compare the summary with the plan to check for inconsistencies between the documents.

Another justification for having the SPD govern over a conflicting provision in the Plan is discussed in *Hansen v. Continental Insurance Company*,<sup>62</sup> in which the Fifth Circuit illustrated that an argument in favor of having the terms of the Plan supersede those of the SPD is essentially a Catch-22. “The result would be that before a participant in the plan could make any use of the summary, she would have to compare the summary to the policy to make sure that the summary was unambiguous, accurate, and not in conflict with the policy.”<sup>63</sup> The court provided additional justification for its decision by couching it in terms of the established tenet of contract law known as *contra proferentem*:

Any burden of uncertainty created by careless or inaccurate drafting of the summary must be placed on those who do the drafting, and who are most able to bear that burden, and not on the individual employee, who is powerless to affect the drafting of the summary or the policy and ill equipped to bear the financial hardship that might result from a misleading or confusing document. Accuracy is not a lot to ask.<sup>64</sup>

In recognizing benefit plans’ contractual nature, the court took notice of the disparate levels of bargaining power enjoyed by the parties to a benefit plan. An employee more or less must take what is given to him or her, while the employer is free (within the confines of ERISA of course) to determine all aspects and terms offered. Although an accurately drafted SPD in no way increases employees’ bargaining power, it does provide them the means with which to readily understand and rely upon the terms of the agreement to which they become a party.

Although the circuits are more or less uniform on the issue of SPD precedence, they are split on whether a plan participant or beneficiary must plead reliance on or resulting prejudice from the deficient or contradictory SPD in order to

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<sup>62</sup> 940 F.2d 971 (5th Cir. 1991).

<sup>63</sup> *Id.* at 981.

<sup>64</sup> *Id.* at 982.

succeed on a claim. The following section addresses leading appellate-level cases in each circuit that articulate the respective positions on the topic of reliance and prejudice.

#### IV. Circuit Court Rulings on the Issue of Reliance and Prejudice

##### A. *Govoni* and related cases: Reliance or Prejudice Requirement

In the First Circuit, the 20-year-old ruling in *Govoni v. Bricklayers, Masons and Plasterers International Union of America, Local No. 5 Pension Fund*<sup>65</sup> remains the most influential case addressing a plan and an SPD. Govoni worked in the union from 1951 until he retired in 1979, with a break in service between March 1962 and October 1966. Before the union amended its pension rules in 1976 (in response to the 1974 passage of ERISA), this break would have disqualified Govoni from pension credits earned before the break, while under the amended rules he would be entitled to the pre-break credits as well. The amended rules, provided that the vesting requirements changes were to “commenc[e] August 1, 1976 . . . .”<sup>66</sup> It was uncertain, however, whether that effective date was intended to apply to future breaks in service or to filings for benefits enacted thereafter Govoni argued that these new rules should be given the latter construction. Govoni reasoned that because he retired after the effective date of the amendment the entire span of his career with the union should count toward his pension. Although the court declined to adopt this interpretation of the amendment, it did agree with Govoni’s second argument, finding that “the summary plan description available to Govoni does not reveal that those with pre-1976 breaks will be treated more harshly than those with post-1976 breaks.”<sup>67</sup> The court found that the SPD did not accurately reflect the plan document; even so, the court refused to rule Govoni’s favor on the basis of “[c]ase law suggest[ing] . . . that to secure relief, Govoni must show *some significant reliance upon, or possible prejudice flowing from,* the faulty plan description.”<sup>68</sup> Because his actions from 1962 to 1966 could not have been predicated upon a rule change made ten years later, Govoni could not avail himself of the benefits of the new rule.

After the disposition of this case in 1984, the *Govoni* rule requiring either reliance or prejudice gained wide acceptance within other circuit courts. In addition

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<sup>65</sup> 732 F.2d 250 (1st Cir. 1984).

<sup>66</sup> *Id.* at 251.

<sup>67</sup> *Id.* at 252.

<sup>68</sup> *Id.* (emphasis added).

to the First Circuit, the Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits have all adopted some version of the rule espoused in *Govoni*.

Four years after *Govoni*, the First Circuit revisited the issue of reliance upon an SPD in *Bachelder v. Communications Satellite Corporation*.<sup>69</sup> In *Bachelder*, employees of Communications Satellite Corporation (Comsat) filed a class action suit against the company claiming additional money under their employee stock ownership plan. The dispute centered around a provision of the plan that gave employees a cash payment option once they reached seven years with the company. At the end of 1983, Bachelder and other similarly situated employees chose to receive a cash payment for their Comsat stock, which was trading at \$32.75 at that time. However, by the time fiduciaries actually sold the stock, its value had decreased to \$25.75, resulting in a significantly lower cash distribution among employees. In their suit, employees pointed to terms in their SPD, which provided the following example:

Let's say, for example, that for 1976 your account was credited with 20 shares of COMSAT stock that were worth \$700 at that time. During the 84 months through 1983, that portion of your account grew in value to \$1,200 (due to dividends paid and reinvested as well as gains in market value). As soon as possible after the end of 1983, you'd receive a payout in shares of stock (and cash for any fraction of a share) or entirely in cash equal to \$1,200.<sup>70</sup>

The district court granted the employees' motion for summary judgment, finding "that the SPD 'unambiguously promises that participants who elect to receive a cash distribution will have their stock converted to cash at its value on December 31, 1983 and paid to them as soon as possible thereafter.'" <sup>71</sup> On appeal, the First Circuit vacated the district court's finding that the SPD was both unambiguous and binding upon plan administrators. The circuit court found that the SPD was in fact ambiguous and that under *Govoni* the appellees could not recover "because [they] did not show significant reliance or even the possibility of prejudice flowing from the SPD."<sup>72</sup>

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<sup>69</sup> 837 F.2d 519 (1st Cir. 1988).

<sup>70</sup> *Id.* at 520.

<sup>71</sup> *Id.* at 521 (quoting *Bachelder v. Communications Satellite Corp.*, 657 F.Supp. 423, 425 (D.Me. 1987)).

<sup>72</sup> *Bachelder*, 837 F.2d at 522-23 (citing *Govoni v. Bricklayers, Masons and Plasterers International Union of America, Local No. 5 Pension Fund* 732 F.2d 250, 252 (1st Cir. 1984)).

In 1998, the U.S. District Court for Massachusetts was confronted with this issue in *Mauser v. Raytheon Company Pension Plan for Salaried Employees*.<sup>73</sup> As in *Govoni*, *Mauser* involved a break in service that ultimately proved unfavorable to plaintiff's pension award. Mauser worked for Raytheon from 1966 to 1980. After leaving the company, Mauser withdrew his contributions to the pension plan in a lump sum. He then returned to the company in 1988. During Mauser's "break-in-service," Raytheon had amended its pension plan, making it more favorable to employees. However, the company decided not to include Mauser's pre-break years of service in the overall computation of his benefits, which resulted in a reduction in his pension. Among other things, Mauser's complaint alleged a conflict between the terms of the Amended Plan and the SPD. He claimed that the SPD led him to believe that he would be credited for his pre-break years of service. Defendants, in their motion for summary judgment, pointed to the relatively few employees that could possibly find themselves in Mauser's predicament and argued that a "plan summary is not required to anticipate every possible idiosyncratic contingency that might affect a particular participant's or beneficiary's status."<sup>74</sup> Additionally, the defendants contended that Mauser did not show evidence of "significant detrimental reliance or possible prejudice"<sup>75</sup> from alleged deficiencies in the SPD. The court found neither of these issues ripe for summary judgment.

Mauser pointed to his expectation of a certain pension income and its influence on his personal finances, citing such expenditures as purchasing a vacation home and spending more on his daughter's wedding than he would otherwise have done. The court found that "Mauser . . . appears to have raised a triable issue of fact as to the reasonableness and significance of his reliance on the SPD."<sup>76</sup> "The district court concluded that the Plan Summary was inadequate and that there was 'some' 'thin' reliance [on the SPD]."<sup>77</sup> Both parties appealed. The First Circuit found that

<sup>73</sup> 31 F.Supp.2d 168 (D. Mass. 1998), *aff'd in part rev'd in part*, 239 F.3d 51 (1st Cir. 2001).

<sup>74</sup> *Id.* at 173 (citing *Lorenzen v. Employees Ret. Plan of the Sperry & Hutchinson Co.*, 896 F.2d 228, 236 (7th Cir. 1990)).

<sup>75</sup> *Id.* at 174 (citing *Bachelder*, 837 F.2d at 521; *Govoni*, 732 F.2d at 252; *Santiago Rolon v. Chase Manhattan Bank*, 912 F.Supp. 19, 21 (D. Puerto Rico, 1996)).

<sup>76</sup> *Id.*

<sup>77</sup> *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51, 54 (1st Cir. 2001). The court concluded that Mauser could redeposit his previously withdrawn pension contributions (with interest) and have his pre-1981 pension recalculated under the old formula. His years of service from 1988 to retirement would be calculated under the new formula. Mauser was also awarded \$35,000 in attorneys' fees.

Mauser did not rely on the SPD to such an extent that it created a “measurable prejudice.”<sup>78</sup> With regard to the financial decisions Mauser made based on an expectation of a certain level of pension income, the court stated, “the mere forming of an expectation as to benefits is not enough.”<sup>79</sup> Appellate courts have been slow to broaden the scope of activities that adequately demonstrate reasonable reliance, typically requiring affirmative decisions with respect to the management of benefit plans in order adequately to demonstrate reliance on a passage in the summary.

The Fourth Circuit followed the First Circuit’s reasoning in *Aiken v. Policy Management Systems Corporation*.<sup>80</sup> “[T]o secure relief, [the claimant] must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description. We adopt *Govoni*’s disjunctive construction as our own.”<sup>81</sup> Aiken, a Policy Management Systems Corporation (PMSC) employee, opted to resign under protest instead of being fired after he was confronted with allegations of sexual harassment. He claims to have chosen this method of departure because of a belief that an early retirement would allow him a lump sum distribution of his vested benefits. Specifically, the SPD stated: “[i]f a participant terminates employment after completing 20 years of service but before attaining age 60, the participant is entitled to distribution of the vested interest in the Plan.”<sup>82</sup> Due to conflicting language in the Plan, Aiken was told he would have to wait until he turned sixty to receive his benefits. The Fourth Circuit reversed the district court’s grant of summary judgment in PMSC’s favor, thereby adhering to a *Govoni*-style enforcement of the SPD over conflicting terms in the Plan. The appellate court also clarified the above-cited disjunctive rule about reliance and prejudice, emphasizing that a showing of either reliance or prejudice would meet the requirements of a section 1022 claim. The case

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<sup>78</sup> *Id.* at 56 (citing *Bachelder*, 837 F.2d at 523, n. 6).

<sup>79</sup> *Id.* The court also noted the fact that Mauser failed to show that he had performed any detailed financial planning before he was advised by counsel, along with the fact that he continued to rely on a certain level of pension income despite receiving an annual statement of benefits in 1990 that indicated otherwise. The court described reliance on the latter as unreasonable.

<sup>80</sup> 13 F.3d 138 (4th Cir. 1993).

<sup>81</sup> *Id.* at 141 (citing *Govoni*, 732 F.2d at 252; *Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 26 (4th Cir. 1992)) (internal citations omitted).

<sup>82</sup> *Id.* at 140 n.2.

was remanded to the district court to determine whether Aiken actually did rely on *or* was prejudiced by the line in the SPD.<sup>83</sup>

The District Court for the Southern District of West Virginia considered the issue of when an omission from the SPD rises to the level of conflict with the Plan Document in an unpublished opinion, *Moore v. Goodyear Rubber & Tire Company*.<sup>84</sup> Moore worked at a Goodyear plant when it was purchased by Shell Oil. As part of the purchase agreement, Shell agreed to hire the workers from the plant. However, due to other provisions of the sale, workers who met the criteria for an early retirement from Goodyear were faced with a dilemma:

If they applied for the pension and also went to work for Shell, they would lose their seniority rights accumulated at Goodyear and could not carry over their years of service with Goodyear for calculating pension benefits from the Shell pension plan. However, Goodyear was telling them that if they did not apply prior to the sale they would lose their entitlement to an early retirement pension.<sup>85</sup>

After the sale, Moore worked for Shell for an additional three years before attempting to receive an early retirement pension from the original Goodyear Pension Plan. Goodyear denied that Moore was entitled to the pension. Among other claims, Moore argued “that there is nothing in this language of the SPD regarding having to file an application for early retirement or having to file it while still employed by Goodyear.”<sup>86</sup> Although a conflict of omission did seem to become evident between the Plan and the SPD, the court sidestepped the issue by focusing first on the reliance or prejudice requirement instead of the conflict requirement. Moore claimed that in continuing his employment, he was relying on the SPD. However, the court disagreed. “Simply continuing his employment, however, is not sufficient to establish significant reliance because the alternative would have been to quit, which under the express terms of the plan would have eliminated his eligibility

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<sup>83</sup> The district court had previously ruled that Aiken was not prejudiced by the denial because he would have been fired even if he did not choose retirement. The circuit court, however, ordered separate factual findings on areas of prejudice and reliance. If either applied to Aiken, the court decided, it would be enough to establish a valid claim.

<sup>84</sup> No. CIV.A. 3:95-0873, 1998 WL 917817 (S.D.W.Va. Sept. 29, 1998).

<sup>85</sup> *Id.* at \*2.

<sup>86</sup> *Id.* at \*8.

for an early retirement pension.”<sup>87</sup> Moore then claimed that he would be prejudiced because his retirement plans were based on an expectation of a certain pension. Similar to the result in *Mausser*, the West Virginia court decided: “[f]rustrated retirement planning does not constitute prejudice . . . .”<sup>88</sup> Although this decision does not set precedent within the Fourth Circuit, it shows that courts interpreting *Aiken* have placed the importance of the reliance/prejudice requirement on a par with the conflict requirement.

The Seventh Circuit decided that the SPD supercedes the Plan in *Senkier v. Hartford Life & Accident Insurance Company*.<sup>89</sup> In a case that focused on the meaning of “accident” as it relates to insurance coverage of medical mishaps, the court’s discussion began with the term as defined in the insured’s Plan and SPD. The court found no contradiction between the two definitions; instead, it noted that the Plan clarified the SPD’s summarized definition. The court held: “The insured is protected by the fact that, in the event of a discrepancy between the coverage promised in the summary plan document and that actually provided in the policy, he is entitled to claim the former.”<sup>90</sup> The court then elaborated on its use of “discrepancy,” indicating that the rule should apply “only if there is a contradiction between the summary plan document and the policy. There is not in a case such as this where the policy *clarifies* rather than *contradicts* the summary.”<sup>91</sup>

The Seventh Circuit did not address the issue of detrimental reliance in *Senkier*. However it did decide on a rule a few years later in *Health Cost Controls of*

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<sup>87</sup> *Id.* (citing *Henne v. Allis-Chalmers Corp.*, 660 F.Supp. 1464, 1474-75 (E.D. Wis. 1987)).

<sup>88</sup> *Id.* at \*8 (citing *Hein v. F.D.I.C.*, 88 F.3d 210, 211-12 (3d Cir. 1996)).

<sup>89</sup> 948 F.2d 1050 (7th Cir. 1991).

<sup>90</sup> *Id.* at 1051 (citing *Hansen v. Continental Insurance Co.*, 940 F.2d 971, 982 (5th Cir. 1991); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988); *McKnight v. S. Life & Health Ins. Co.*, 758 F.2d 1566 (11th Cir. 1985)).

<sup>91</sup> *Id.* at 1051 (emphasis added). The court expounded on this idea in *Mers v. Marriott Int’l Group Accidental Death & Dismemberment Plan* stating, “an SPD’s silence on an issue does not estop a plan from relying on the more detailed policy terms when no direct conflict exists.” 144 F.3d 1014, 1023 (7th Cir. 1998), the court then reinforced its position, saying that as long as an SPD comports with the requirements of ERISA (29 U.S.C. § 1022), “a participant or beneficiary may rely on an SPD and estop a plan administrator from denying coverage for terms found in the underlying policy only if there is a direct conflict between an SPD and the underlying policy.” *Id.* at 1024 (citing *Herrmann v. Cencom Cable Assocs., Inc.*, 978 F.2d 978, 983 (7th Cir. 1992); *Senkier*, 948 F.2d at 1051; *Fuller v. CBT Corp.*, 905 F.2d 1055, 1060 (7th Cir. 1990)).

*Illinois, Inc. v. Washington*.<sup>92</sup> Valerie Washington was injured in an automobile accident, and her ERISA-governed employee health plan covered her medical expenses, which came to about \$10,000. She then received a \$60,000 award from her automobile insurance policy. The employee plan assigned its claim to Health Cost, which sought to recover the \$10,000 in medical expenses from Washington as per a provision in her Plan expressly allowing it to do so.<sup>93</sup> Washington contended that due to a contradictory provision in the SPD,<sup>94</sup> she should not have to pay anything to Health Cost. She argued that the Plan's use of the article "a," and the SPD's use of the article "the," before "third party" changes the respective meanings of the two phrases, making them contradictory. While "a third party" would mean *any* third party, Washington argued that, "the third party" means only "the injurer (the third party who cause[d] the injury)."<sup>95</sup> The court rejected this interpretation as "senseless" and refused to give it any credence. However, before doing so, the court clarified its position regarding detrimental reliance on an SPD.

When, however, the plan and the summary plan description conflict, the former governs, being more complete—the original, as it were, which the summary plan description excerpts and translates into language that may be imprecise because it is designed to be intelligible to lay persons— unless the plan participant or beneficiary has reasonably relied on the summary plan description to his detriment.<sup>96</sup>

Like the Fourth Circuit, the Eighth Circuit looked to *Govoni* for guidance on the issue. In *Lee v. Union Electric Company*,<sup>97</sup> the plaintiff was denied survivor income

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<sup>92</sup> 187 F.3d 703 (7th Cir. 1999).

<sup>93</sup> *Id.* at 711. Washington's Plan explained that it "ha[d] the right to be reimbursed for the value of services it ha[d] provided when a beneficiary receive[d] payment from a third party".

<sup>94</sup> *Id.* Washington's SPD states that the Plan "will provide medical services and treatment for injuries caused by a third party. You must, however, assign to the [plan] all rights to obtaining reimbursement from *the third party* for medical services provided by or through the [plan] . . ." *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (citing *Mers v. Marriot Int'l Group Accidental Death and Dismemberment Plan*, 144 F.3d 1014, 1022-24 (7th Cir. 1998); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1518-19 (11th Cir. 1996); *Aikens v. Policy Management Systems Corp.*, 13 F.3d 138, 140 (4th Cir. 1993); *Senkier v. Hartford Life and Accident Insurance Corp.*, 948 F.2d 1050, 1051 (7th Cir. 1991).

<sup>97</sup> 789 F.2d 1303, 1303-04 (8th Cir. 1986).

benefits after her husband, who worked for the company, passed away. She claimed that the SPD given to her and her husband led them to believe that she would be covered in the event that her husband passed away before retirement. The court found that the SPD did not say this and pointed to language that stated “employees must elect an alternative option to provide annuity payments to a surviving spouse in the event of the employee’s death before retirement. It would be tautological to require it also to state that if the Option is not elected, its benefits will not be available.”<sup>98</sup> Thus the court deemed adequate the SPD provided to the plaintiffs. However, the court then in dictum adopted the *Govoni* rule<sup>99</sup> in the event that the SPD did not meet all the requirements of section 1022, noting that this would place an additional burden on the plaintiffs in successfully meeting the criteria for a claim.

In *Anderson, v. Alpha Portland Industries, Inc.*,<sup>100</sup> a class of former hourly workers at Alpha filed suit against the company after the company decided to “terminate all retiree health and life insurance benefits . . . .”<sup>101</sup> The plaintiffs argued that these benefits had vested and as such, could not be terminated. However, the district court found that the benefits were part of a collective bargaining agreement and were intended only to last the length of that agreement. The plaintiffs attempted to collect under several different theories, one of which was that the company’s 1978 SPD did not meet the requirements of section 1022. The employees claimed that “1) the SPD failed to specify the ‘circumstances which may result in disqualification, ineligibility, or denial or loss of benefits’[,] and 2) the SPD guarantees benefits for life.”<sup>102</sup> However, this line of reasoning would put the employees under the *Govoni* rule espoused in *Lee* and force them to show either “reliance” or “prejudice.” The employees attempted to sidestep this requirement by alleging that the SPD was not necessarily “faulty,” an express precondition to invoking the *Govoni* rule. However, the court reasoned that an SPD is inherently “faulty” to the extent that it conflicts with the terms of the Plan.<sup>103</sup> The employees next attempted an argument based on

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<sup>98</sup> *Id.* at 1308.

<sup>99</sup> See *Govoni v. Bricklayers, Masons and Plasterers International Union of America, Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984) (stating that “[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.”).

<sup>100</sup> 836 F.2d 1512 (8th Cir. 1988).

<sup>101</sup> *Id.* at 1513.

<sup>102</sup> *Id.* at 1520.

inferred reliance on the SPD. However, the court found no reason to infer reliance, finding that “absent some evidence of reliance, it would be improper to infer that any of the plaintiffs relied to their detriment on the SPD.”<sup>104</sup>

The issue of whether an SPD in conflict with the terms of a Plan is “faulty” per se was again discussed in *Marolt v. Alliant Techsystems, Inc.*<sup>105</sup> Marolt worked for Honeywell from 1980 to 1989. In 1990, divisions of Honeywell were spun off to create Alliant. Two months after the new company was created, Marolt went to work for it as a temporary employee. Roughly four months after that, she was offered a permanent position at Alliant with assurances that her service with Honeywell prior to the break in service would be “bridged,” that is, counted toward her pension and benefits plans. More than three years later, in June 1994, Marolt was informed that her previous service with Honeywell would not be counted. Her administrative appeal was denied and she subsequently initiated proceedings against her employer. Marolt pointed to the relevant sections of her SPD, according to which she would undoubtedly qualify for bridging her years of service. Invoking the *Govoni* rule, as previously adopted by the Eighth Circuit in *Maxa v. John Alden Life Ins. Co.*,<sup>106</sup> as well as *Lee* and *Anderson*, Alliant argued that evidence of detrimental reliance was required before Marolt could succeed on her claim. The court disagreed, however, noting that the SPD in that case was not faulty. Clarifying its earlier decision, the court explained: “*Anderson* stands for the unremarkable proposition that an ERISA plaintiff who claims a summary plan description violates 29 U.S.C. section 1022 necessarily contends the summary description is faulty.”<sup>107</sup> Thus, the Eight Circuit decided that detrimental reliance *is* a requirement when a claim alleges that an SPD does not

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<sup>103</sup> *Id.* (“[B]ecause to the extent plaintiffs argue that the SPD provides lifetime benefits, and therefore is inconsistent with the [Plan], it necessarily must be faulty.”). In fact, a closer reading (and the *Marolt* court’s subsequent discussion on the matter) reveals that while it may seem that an SPD that is in conflict with the Plan is necessarily faulty, it is instead an SPD that does not meet ERISA’s requirements that should be deemed faulty. This is an important distinction. *See also* *Marolt*, *infra* note 105 and accompanying text.

<sup>104</sup> *Anderson*, 836 F.2d at 1520.

<sup>105</sup> 146 F.3d 617 (8th Cir. 1998).

<sup>106</sup> 972 F.2d 980, 984 (8th Cir. 1992) (citing *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1302 (8th Cir. 1984) (“[E]vidence of detrimental reliance must show that the plaintiff [ ] took action, resulting in some detriment, that [he] would not have taken had [he] known [that the terms of the plan were otherwise], or that he failed, to his detriment, to take action that he would have taken had he known that the terms of the plan were otherwise.”) (citations omitted)).

<sup>107</sup> *Marolt*, 146 F.3d at 621-622.

conform to the statute, but it *is not* a requirement of a claim that alleges an SPD is merely in conflict with the terms of the Plan.

The Tenth Circuit has developed relatively little common law on the subject; however, it did consider inconsistencies between an SPD and a Plan Document in *Chiles v. Ceridian Corporation*.<sup>108</sup> In *Chiles*, a class of disabled employees filed suit against administrators of an ERISA-sponsored Long Term Disability Plan in an attempt to recover benefits that had been retroactively discontinued and denied them. The dispute centered around the plan's payment of health insurance premiums while employees were considered to be on long term disability status. Although the administrators claimed that they never intended to vest employees on long-term disability with continuing payment of premiums, three phrases in the SPD could certainly be read to convey that interpretation.<sup>109</sup> However, the court noted, "[t]he mere demonstration that the SPD is inconsistent with the terms outlined in the LTD Plan itself does not entitle plaintiffs to the benefits they believe vested upon termination . . . . Only where employees rely on an ambiguous or faulty SPD, or otherwise show prejudice from the inconsistency between the SPD and the master plan document, is relief appropriate."<sup>110</sup> The court cited the rule espoused in the

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<sup>108</sup> 95 F.3d 1505 (10th Cir. 1996). The case focuses primarily on resolving the issue of whether the employees were vested at the time the plan administrators changed the terms of the plan. It also discusses at length the validity of a reservation of rights clause that appears alongside a promise of lifetime benefits. The court also discussed the roles of SPDs and Plan Documents when the two conflict.

<sup>109</sup> The court cited the following phrases from Control Data's Long Term Disability Plan SPD: "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 dependants were enrolled before your disability began. The company will continue paying all premiums until you and your dependants are no longer eligible for the plans." It continued, "[i]f 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." On the other hand, the SPD also stated: "Control Data expects to continue the [Long-Term Disability/Health/Dental/Life] Plan indefinitely, but must reserve the right to change or discontinue it if it becomes necessary." Similar sections of the Plan's master documents "allowed plan amendment 'if deemed advisable' by Control Data, and retained the employer's right to terminate 'at any time.'" The case involved multiple plans and a change in company ownership (Control Data sold Imprimis, the company for which the plaintiffs worked, continued to fund the Imprimis LTD Plan, and changed its name to Ceridian Corp.), which gave rise to a dispute as to which SPD and which Plan Document controlled. The court ultimately decided that the record was not developed enough to decide which plan/SPD would control and accordingly remanded it back to the district court. *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1508-1509 (11th Cir. 1996).

<sup>110</sup> *Id.* at 1519.

*Aiken-Govoni-Bachelder* line of cases in reaching its decision to remand the case to the district court for a determination of whether the plan administrators intended vesting of premium payment benefits or, if they did not, whether each plaintiff could “demonstrate some reasonable reliance on the SPD provision or prejudice flowing from the inconsistency between the SPD and the Plan master document.”<sup>111</sup>

The Eleventh Circuit took a similar stance on the issue of reliance in *Branch v. G. Bernd Company*,<sup>112</sup> in which Branch, administrator of Dwayne Bell’s estate, filed for retroactive COBRA benefits for the deceased to cover \$98,000 in hospital fees. The issue was whether Bell’s incapacitation during the COBRA election period<sup>113</sup> allowed him extra time in which he or a legal representative could elect those benefits (equitable tolling). The circuit court found that Bell’s incapacitation allowed for the delayed filing. However, it rejected the district court’s ruling that a claimant need not show reliance on the terms of an SPD that are inconsistent with those of the Plan. In reaching its decision, the *Branch* court cited *Govoni, Bachelder*, and *Gridley* in support of its position. The court also revisited its earlier decision in *McKnight v. Southern Life and Health Ins. Co.*<sup>114</sup> to explain that a claimant must show good cause for enforcing the inconsistent terms of the SPD. The court said:

[W]hen an employer provides an inaccurate plan summary, the beneficiaries who rely on that summary are not accurately apprised of their rights. But when a beneficiary fails to read or rely on the summary, whether it is accurate or not, the beneficiary also prevents full appraisal of the rights under the plan. . . . We thus hold that, to prevent an employer from enforcing the terms of a plan that are

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<sup>111</sup> *Id.*

<sup>112</sup> 955 F.2d 1574, 1576 (11th Cir. 1992).

<sup>113</sup> Congress mandated a minimum 60-day election period in 29 U.S.C. § 1165(1). The company’s ERISA-governed Plan allowed for a 60-day election period, however, the SPD distributed to employees required election of COBRA benefits within 31 days.

<sup>114</sup> 758 F.2d 1566 (11th Cir. 1985). It was in this case that the Eleventh Circuit made its oft-cited decision that “[i]t is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document, and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet.” *Id.* at 1570. Although this decision did not address the question of whether reliance or prejudice is a necessary factor in a § 1022 claim, it did mention an employee’s need to “rely” on the SPD as a reason for prohibiting the terms of the Plan to trump inconsistent terms in the SPD. *Id.*

inconsistent with those of the plan summary, a beneficiary must prove reliance on the summary.<sup>115</sup>

In making this decision, the court focused on the need for a claimant to be fully apprised of his or her rights before he or she can succeed on a claim based on those rights. Although the court did not specifically say what would constitute reliance, it found nothing even resembling reliance in that case.<sup>116</sup>

This completes the list of circuits that have adopted the *Govoni* rule requiring reliance and/or prejudice; other circuits, however, have held in accord with the *Burstein* court and require no demonstration of reliance and/or prejudice.

### **B. *Burstein* and Related Cases – No Showing of Reliance or Prejudice Necessary**

The Fifth Circuit took up the issue of Plan-SPD conflict in *Hansen v. Continental Insurance Co.*, which has already been discussed to the extent that it decided that an SPD controls against conflicting terms in the Plan. Martin Hansen's wife died as the result of a car accident. Hansen subsequently filed a claim under his ERISA-governed accidental death policy and was issued a check for \$40,000 less than the SPD led him to believe he should receive. Instead of cashing the insufficient

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<sup>115</sup> *Branch*, 955 F.2d at 1579. The court did, however, find in Branch's favor, deciding that even though the 60-day election period had passed, that time period was tolled from the time of Bell's incapacitation until an administrator was appointed to his estate. He therefore timely appealed and could receive benefits under COBRA.

<sup>116</sup> In a later decision in *Buce v. Allianz Life Insurance Company*, 247 F.3d 1133 (11th Cir. 2001), Circuit Judge Carnes issued a concurring opinion that provides insight into what specific actions the Eleventh Circuit might consider as evincing some sort of reliance on a deficient SPD. *Id.* at 1154-1158. Mrs. Buce's husband died in a single automobile accident. *Id.* at 1136. His blood alcohol level read .22 a few hours after the accident and he was denied accident benefits due to an intoxication exclusion. *Id.* That exclusion, however, appeared in the Plan and not in the SPD. Although the majority ruled against Buce, it did so because of other factors involving a choice-of-law provision. Carnes, however, discussed the case in terms of reliance on a deficient SPD. *Id.* at 1156. He found that Mrs. Buce did not prove reliance as required in *Branch* by simply testifying that she would have ordered an immediate autopsy if she thought the policy had an alcohol-related accident exclusion. *Id.* at 1157. Carnes ruled that "[I]n this context, a requirement of reliance includes a showing of detriment" *Id.* at 1156. As Mrs. Buce did not rely *to her detriment* on the SPD, she therefore could not succeed on the claim. Carnes pointed to the fact that Mrs. Buce gave no testimony indicating she had any reason to believe that an autopsy or accident reconstruction would provide any showing of detriment. *Id.* at 1156. Although the concurring opinion does not set precedent, Carnes states, as an example, that evidence indicating that a claimant would have chosen other insurance if not for the discrepancy in the SPD could satisfy the requisite showing of detrimental reliance. *Id.*

check, Hansen brought suit against Continental, his insurance carrier. The conflict between the SPD and the terms of the plan in this case is striking.<sup>117</sup> As noted above, the court squarely held that the terms of the SPD govern. Continental then argued that Hansen failed to show that he relied on the terms of the SPD to his detriment. However, lacking precedent, the court left “for another day the question of whether a plaintiff in an action such as this must demonstrate reliance on the summary plan description.”<sup>118</sup> The court did take note that even if reliance were a necessary element of Hansen’s claim, he provided enough evidence to indicate he relied on the SPD. As part of the evidence in Hansen’s favor, the court cited an affidavit provided by Hansen that stated “that he read the plan summary, including the paragraph in question, and understood it to mean that his wife was insured for 60% of his principal amount.”<sup>119</sup> This showing of reliance is quite different from that required by other circuit courts, which often insist on measurable affirmative decisions and actions to demonstrate reliance on a certain provision.

In *Rhorer v. Raytheon Engineers and Constructors, Inc.*,<sup>120</sup> the Fifth Circuit echoed the pertinent part of its decision in *Hansen*. Susan Rhorer brought an ERISA action after being denied a life insurance benefit following her husband’s death. Raytheon had purchased Mr. Rhorer’s company and retained him as a full-time employee even though he worked from home and hospital due to failing health. Rhorer selected the optional life insurance package in question and kept up his premium payments. The Fifth Circuit overturned a summary judgment granted to the defendants by the district court and allowed Rhorer to proceed with her case. The issue was whether or not the absence of an “actively at work” requirement in the SPD section dealing with the optional life insurance plan rose to the level of a conflict with the corresponding clause in the Plan that expressly included the phrase. Reading the SPD as a whole, the court ruled that it was in fact a conflict despite “Raytheon’s argument that *Hansen* is only controlling in cases where there is a *positive* conflict between the summary plan

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<sup>117</sup> The SPD reads as follows: “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.” Hansen had two eligible children so under this definition, he would be entitled to 60 percent of his \$200,000 benefit or \$120,000. The terms of the policy, however, show the following: “40% of the Principal Sum applicable to the employee if there are dependant children insured at the time of loss.” Under this reading, Hansen would only be eligible for \$80,000, the amount initially paid by Continental. *Hansen*, 940 F.2d at 980.

<sup>118</sup> *Hansen*, 940 F.2d, at 983.

<sup>119</sup> *Id.*

<sup>120</sup> 181 F.3d 634 (5th Cir. 1999).

description and the policy.”<sup>121</sup> Raytheon then argued that Mrs. Rhorer never relied on the deficient SPD, to which the court responded that it “ha[d] never held that an ERISA claimant must prove reliance on a summary plan description in order to prevail on a claim to recover benefits.”<sup>122</sup> However, like the *Hansen* court, the *Rhorer* court went on to note that Mr. Rhorer’s reading of the SPD and his subsequent payment of premiums would be “sufficient to raise a triable issue of fact as to whether Mr. Rhorer relied on the summary plan description.”<sup>123</sup>

In both cases, the Fifth Circuit noted in dicta that although reliance was not a requirement of the claim, both claimants would have met the requirement. This seems to leave open the question of how the Fifth Circuit would decide a case in which the claimant had not so straightforwardly displayed reliance on an SPD. *Rhorer* does require that a court give employees the benefit of the doubt: “ambiguous terms in [the] summary plan description are resolved in the employee’s favor.”<sup>124</sup> The Second Circuit’s *Burke* decision seems to share in this sentiment by virtue of its “likely prejudiced” standard. These standards tend to equate conflicting provisions between the SPD and Plan, standing alone, as a form of prejudice against the employee. Employers may rebut this assumption by pointing to the fact that it was a harmless error, but in these circuits the burden of proof has shifted from plan participants to plan administrators.

In *Edwards v. State Farm Mutual Automobile Insurance Company*,<sup>125</sup> the Sixth Circuit considered the issue of detrimental reliance. Under State Farm’s retirement plan, a worker would be entitled to benefits if the sum of his age plus his years of service equaled at least fifty-five. Hugh Edwards was within a year of meeting that requirement when he was forced to go on paid sick leave for about nine and a half months (200 business days). After his paid sick leave, he continued on unpaid sick leave for roughly another nine and a half months. If not for the time away from work, Edwards would have earned his benefits by virtue of meeting the fifty-five-year requirement. The dispute arose over whether his time on sick leave counted

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<sup>121</sup> *Id.* at 642 (emphasis added).

<sup>122</sup> *Id.* at 644 n.12 (citing *Schadler v. Anthem Life Ins. Co.*, 147 F.3d 388, 393 n.4 (5th Cir. 1998); *Hansen*, 940 F.2d at 983).

<sup>123</sup> *Id.* (citing *Hansen*, 940 F.2d at 983).

<sup>124</sup> *Id.* at 641. *See also* *McCall v. Burlington Northern/Santa Fe Co.* 237 F.3d 506, 512 (5th Cir. 2000) (stating that “any ambiguities in the SPD must be resolved in the employee’s favor”).

<sup>125</sup> 851 F.2d 134 (6th Cir. 1988).

toward his retirement benefits. Among other things,<sup>126</sup> Edwards produced the company's SPD, which contained the provision: "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."<sup>127</sup> Relying on language in the Plan, State Farm denied Edwards benefits, stating that he did not meet the length of service requirement.<sup>128</sup> The Sixth Circuit found that Edwards relied on misrepresentations in the SPD to his detriment. However, the court decided that pleading detrimental reliance should not be a burden placed upon a claimant, stating that "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."<sup>129</sup>

The Sixth Circuit reinterpreted its *Edwards* decision in *Helwig v. Kelsey-Hayes Company*,<sup>130</sup> but the facts of that case required further exposition of the detrimental reliance question. In *Helwig*, retired employees of Kelsey-Hayes filed a class action lawsuit to prevent their former employer from changing the terms of their retirement health benefits.<sup>131</sup> The trial court enjoined Kelsey-Hayes from enacting the proposed change in benefits pending a trial on the merits. Language in the subject SPDs provided: "[w]hen you are retired, your Health Care coverages, except for vision, are continued without cost to you."<sup>132</sup> The Sixth Circuit, following precedent, honored the terms of the SPD over the Plan; however, in doing so the court placed some

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<sup>126</sup> Edwards also received a letter from his personnel manager stating that Edwards either already did qualify or would soon qualify for disability income. He also received an annual statement related to the plan that credited him with 365 days on the plan when he was on sick leave for a substantial portion of the time. *Id.* at 135.

<sup>127</sup> *Edwards*, 851 F.2d at 135.

<sup>128</sup> The Plan defined the length of service as time spent on the job before one's date of disablement, which in turn was defined as "the first workday of any period of time during with the active . . . member does not report to work for the company because of total disability." *Id.*

<sup>129</sup> *Id.* at 137.

<sup>130</sup> 93 F.3d 243 (6th Cir. 1996).

<sup>131</sup> The company instituted a new policy that would require retired former employees to pay "co-payments for service, deductibles, monthly premiums and significantly increased drug co-payments" *Id.* at 245.

<sup>132</sup> *Id.* at 248.

importance on the fact that employees relied on an SPD to their detriment. “What mattered in *Edwards*, and what matters today, is the language actually given to the employees and upon which they could reasonably have relied.”<sup>133</sup> The court’s language, while not mandating a showing of reliance, indicates that future plaintiffs in the Sixth Circuit may have to show some kind of reliance on a deficient SPD in order to recover damages.

The Ninth Circuit has not specifically addressed reliance and prejudice with respect to conflicting SPDs and Plan Documents, though it came closest to the issue in *Bergt v. Retirement Plan for Pilots Employed by MarkAir, Inc.*<sup>134</sup> Bergt, a former pilot, president, and chairman with MarkAir, filed for benefits under a company-sponsored retirement plan and was turned down by the plan’s administration committee. The court found that language in the Plan Document unambiguously promised these benefits to Bergt, while language in the SPD unambiguously barred him from receiving these benefits. The court looked to other circuits for guidance and cited many of the above-mentioned cases, which provided that the SPD controls in the event of a direct conflict. *Bergt*, however, involved the somewhat unique scenario in which the Plan Document provided for benefits over and above those promised by the SPD. The *Bergt* court recast the wording of previous circuit court rulings, determining that in essence “these courts held that it would be unfair to have the employees bear the burden of a conflicting SPD and plan master document and, thus, decided that the provision *more favorable* to the employee controlled.”<sup>135</sup> Thus, the court found in favor of Bergt and awarded him benefits under the provision in the Plan Document. As a further explanation of its ruling, the court specifically adopted the Fifth Circuit’s reasoning in *Hansen*, which invoked the *contra proferentem* doctrine, saying of the Plan and SPD drafters, “[a]ccuracy is not a lot to ask.”<sup>136</sup>

Before *Bergt*, an earlier Ninth Circuit decision, *Atwood v. Newmont Gold Co., Inc.*,<sup>137</sup> had held that “[w]here the SPD fails to meet [29 U.S.C. § 1022(b)]<sup>138</sup> and

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<sup>133</sup> *Id.* at 249.

<sup>134</sup> 293 F.3d 1139 (9th Cir. 2002).

<sup>135</sup> *Id.* at 1145 (citing *Chiles v. Ceridian Corp.*, 95 F.3d 1505 (11th Cir. 1996); *Hansen v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir. 1991); *Heidgerd v. Olin Corp.*, 906 F.2d 903 (2d Cir. 1990); *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134 (6th Cir. 1988); *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566 (11th Cir. 1985)).

<sup>136</sup> *Hansen*, 940 F.2d at 982.

<sup>137</sup> 45 F.3d 1317 (9th Cir. 1995).

differs materially from the terms of the plan, the SPD is controlling.”<sup>139</sup> Shortly thereafter, a district court in Northern California examined the “*Atwood* doctrine” within the framework of a reliance and/or prejudice standard, an issue not addressed in *Bergt*. Although it does not create any authority within the Ninth Circuit, the district court’s analysis in *Lancaster v. United States Shoe Corp.*,<sup>140</sup> may prove informative of how the circuit might rule if presented with the reliance question. First, the court took note of the difference of opinion among the federal circuit courts. The court also pointed to three district court opinions<sup>141</sup> within the Ninth Circuit that required a showing of reliance on a faulty SPD for a claimant to succeed; however, it noted that all three cases were decided before *Atwood*. The court then pointed to two prior Ninth Circuit opinions<sup>142</sup> along the lines of *Atwood* that did not require a showing of reliance. The *Lancaster* court paid special attention to the fact that these courts (*Price* and *Arnold*) cited the decisions in *Hansen* and *Edwards* to support the proposition that “an SPD supersedes a conflicting plan.”<sup>143</sup> Neither *Hansen* nor *Edwards* required a showing of reliance, and the *Lancaster* court therefore declined to impose such a requirement.<sup>144</sup>

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<sup>138</sup> Section 1022(b) mandates that an SPD include “circumstances which may result in disqualification, ineligibility, or denial or loss of benefits.” 29 U.S.C. § 1022(b) (2004).

<sup>139</sup> *Atwood*, 45 F.3d at 1321 (citing *Arnold v. Arrow Transp. Co.*, 926 F.2d 782, 785 n.3 (9th Cir. 1991)).

<sup>140</sup> 934 F.Supp. 1137 (N.D.Cal. 1996).

<sup>141</sup> *Id.* at 1154 (citing *Adams v. J.C. Penney Co.*, 865 F.Supp. 1454, 1459-60 (D.Or. 1994), *aff’d mem.*, 83 F.3d 426 (9th Cir. 1996); *Kaiser Permanente Employees Pension Plan v. Bertozzi*, 849 F.Supp 692, 698 (N.D.Cal. 1994); *Berry v. Blue Cross of Washington & Alaska*, 815 F.Supp. 359, 364-65 (W.D.Wash. 1993)).

<sup>142</sup> *Id.* (citing *Price v. Provident Life & Acc., Ins. Co.*, 2 F.3d 986, 988 n. 1 (9th Cir. 1993); *Arnold v. Arrow Transp. Co. of Del.*, 926 F.2d 782, 785 n. 3. (9th Cir. 1991)).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* The final reason the *Lancaster* court gave for its decision not to impose a reliance standard is unique to the Ninth Circuit. In *Saltarelli v. Bob Baker Group Med. Trust*, 35 F.3d 382 (9th Cir. 1994), the court adopted a reasonable expectations doctrine requiring “an ERISA benefits plan to be interpreted in accordance with the reasonable expectations of the insured.” The doctrine looks to objective expectations and does not consider such things as reliance or state of mind. *Id.*

## V. Conclusion

As the circuit court rulings above demonstrate, the courts are indeed split on the issues of reliance and prejudice. Although many require a showing of reliance and/or prejudice (First, Fourth, Seventh, Eighth, Tenth and Eleventh), the two recent decisions, *Burstein* and *Burke*, may serve as guideposts pointing away from the requirements described in *Govoni* and its progeny. This is especially pertinent for those circuits that have not yet clearly decided the matter. *Burstein* provides the most emphatic repudiation of a reliance standard. After ruling that a conflicting SPD essentially constitutes the Plan itself,<sup>145</sup> the *Burstein* court opined, “just as a court’s enforcement of a contract generally *does not* require proof that the parties to the contract actually read, and therefore relied upon, the particular terms of the contract, we are persuaded that enforcement of an SPD’s terms under a claim for plan benefits does not require a showing of reliance.”<sup>146</sup> Likewise, the Second Circuit’s recognition of a prejudice standard in *Burke*, where conflict equals prejudice, viewed in light of the Supreme Court’s refusal to hear the Plan’s appeal, suggests that courts using the *Govoni* standard may need to revisit the issue.

Although this trend would seem most likely to benefit employees, some benefit is also conferred upon employers. On the one hand, employees will benefit from a lower standard of proof successfully to litigate an improperly denied claim, free from proving “technical” requirements such as reliance or prejudice. As such, employees will have the “appropriate remedies, sanctions, and ready access to Federal courts”<sup>147</sup> guaranteed by ERISA. On the other hand, employers and plan administrators will benefit from a less cumbersome proof standard in which to defend themselves against section 1022 claims for benefits. Proving or disproving reliance and/or prejudice will almost always be a question of fact to be determined by a jury. One might assume that if neither reliance nor prejudice were required, more claims could be decided pretrial, thus saving the parties from an expensive and time-consuming trial. Although a reliance standard *could* work to the advantage of an individual plan administrator, as in *Govoni*, in which the Plan stood to reduce its obligation by virtue of not counting Govoni’s pre-break years of service in his pension calculation, the reliance standard would often lead to a greater volume of

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<sup>145</sup> *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. and Research Found.*, 334 F.3d 365, 381-82 (3d Cir. 2003) (stating that, “[b]ased upon our review of the Congress’s intent, an SPD furnishes the plan’s terms to the extent that it conflicts with (and thus supersedes) the language of a formal plan document.”).

<sup>146</sup> *Id.* at 381.

<sup>147</sup> 29 U.S.C. § 1001(b) (2004).

litigation. The *Burke* decision actually has the potential to compound this problem by placing the onus of proving reliance or prejudice on the administrator and not the employee. In order to avoid such excessive litigation, the lack of a reliance/prejudice requirement, such as the one discussed in *Burstein*, seems the most useful.

The other benefit of *Burstein's* rejection of a reliance/prejudice requirement is the abandonment of what is arguably a very arbitrary and subjective bar for proving those elements. What one court considers reliance, another court may consider wishful thinking; what one court views as prejudice, another might consider bad luck.<sup>148</sup> Discarding this requirement does away with such uncertainty.

This article provides a glimpse into the quagmire that can result from an improperly drafted summary plan description. It should be remembered that plan administrators can avoid this problem by drafting an accurate SPD such that it complies both with ERISA and the underlying Plan it summarizes. Although this may be easier said than done, regular reviews and modifications will help to insure that the SPD is in line with the Plan and its drafters' intentions. ERISA provides very explicit guidelines for amending an SPD<sup>149</sup> and, even though printing and distribution of revisions may seem like an unnecessary additional cost, the reward is the avoidance of costly and unpleasant litigation.<sup>150</sup>

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<sup>148</sup> See, e.g., *Mauser v. Raytheon Company Pension Plan for Salaried Employees*, 239 F.3d 51, 55-56 (1st Cir. 2001) (reversing the lower court's determination of reliance).

<sup>149</sup> 29 U.S.C. § 1024(b) (2004).

<sup>150</sup> Two related issues not addressed in this article bear mention here. First, unless and until the U.S. Supreme Court addresses the reliance/prejudice issue, multi-state plans may also be faced with the prospect of varying solutions to SPD-Plan conflicts. While contract choices of forum and law within a multi-state plan may, if enforceable, tend to simplify conflicts/misinterpretations, such results could also have the effect of fostering a forum/law shopping for the most emphatic prejudice-based jurisdiction by plan administrators. This would certainly seem, however, to contravene the original intent of the ERISA drafters. Second, whether state-based bad faith claims are preempted by ERISA remains to be seen. Plan administrators could, absent preemption, find themselves defendants in bad faith lawsuits where benefits had been withheld based upon SPD-Plan conflicts.