PAPER NO. 21-08-01

August 2021

Unbelievable: ERISA's Broken Promise

(Version 4.1, Aug. 2021, revised Dec. 2021)

by

Peter J. Wiedenbeck

Joseph H. Zumbalen Professor of the Law of Property

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[ver. 4.1; January 2022]

A central but generally neglected objective of federal regulation of pension and welfare benefit plans was to improve overall economic efficiency by providing workers with accessible and reliable information on which to base their career and financial planning. Simple dissemination of plan terms and financial data (full disclosure) cannot achieve that objective because few workers are equipped with the skills needed to evaluate the costs and benefits of complex retirement saving or health care programs. For that reason ERISA, the Employee Retirement Income Security Act of 1974, requires curated *disclosure of plan-related information: it must be presented a format that is both understandable to the average plan participant and sufficiently complete to empower workers to make best use of the program. The length and complexity of most employee benefit plans creates tension between understandability and completeness, calling for tradeoffs to achieve optimal disclosure.*

As implemented ERISA's understandability standard has been jettisoned by plan sponsors seeking protection from liability for failing to tell workers enough. Required plan summaries became unreadable, but plan sponsors could get away with that, both because there was no administrative or judicial enforcement of the understandability standard, and because they could tout the advantages of their benefit plans to workers by means of unregulated informal communications.

The demise of understandability is only half the story. Federal courts also degraded the reliability of mandatory disclosures by finding that the obligation to provide reasonably accurate and complete information is enforceable only in a suit for appropriate equitable relief. In consequence, disclosure defects are often presented as estoppel claims, which triggers search for individual detrimental reliance, and translates into widespread under-enforcement of the reliability standard.

This article explores the policy dimension of ERISA disclosure law and chronicles the decay of the equilibrium Congress envisioned. From the perspective of workers it is a saga of disappointment, disillusionment, and defeat. The new balance serves the interests of federal courts (reduced caseload) and some employers (increased flexibility), but likely contributes to the increasing standardization of employee benefit plans, decreasing their utility as instruments of workforce management. Far worse, it abandons ERISA's goal of improved economic performance through better-informed career and financial planning. Yet those costs are not immutable: employers' liability exposure could be recalibrated by regulation to revive understandability and approach optimal disclosure.

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Peter J. Wiedenbeck[*]

INTRODUCTION

General Motors, hard-pressed by foreign competition during the 1970s and 1980s, determined that it must reduce staffing levels in its salaried workforce.[1] To that end, the company instituted a series of downsizing programs under which designated groups of salaried workers were offered enhanced pension benefits as an inducement to early retirement.[2] By 1988 some 50,000 workers had taken advantage of these offers.[3]

General Motors also maintained a health care plan for its salaried employees, the principal features of which were communicated to employees in summary booklets. These booklets stated that the company would continue to provide basic health care coverage following retirement throughout the lifetime of the employee and his or her surviving spouse, and that GM would pay the full cost of that coverage.[4] The booklets also warned that the company

* Peter J. Wiedenbeck is the Joseph H. Zumbalen Professor of the Law of Property, Washington University in St. Louis. Comments should be directed to peter.wiedenbeck@wustl.edu. The author is grateful for helpful comments on earlier versions of this paper by Leigh Anenson, Scott Baker, Matthew Bodie, Phyllis Borzi, Marion Crain, Mark DeBofsky, Deborah DeMott, Michael Doran, Christine Hurt, Pauline Kim, Arthur Laby, Brendan Maher, Brett McDonnell, Colleen Medill, Dana Muir, Theodore Rave, Natalya Shnitser, Norman Stein, Andrew Stumpff, Andrew Tuch, Julian Velasco, James Wooten, [others]. These scholars have not reviewed nor endorsed the reform proposal sketched out in Part IV. Thanks are due as well to the members of the 2017 Advisory Council on Employee Welfare and Pension Benefit Plans. Valuable research assistance was provided by Meredith Jacobowitz, Han Liu, and Joshua Katz.

1 *See* Sprague v. General Motors Corp., 843 F. Supp. 266, 271 (E.D. Mich. 1994) ("GM needed to substantially reduce its salaried workforce in the 1970's and 1980's in order to remain viable"). The case has a long and complex history with numerous reported opinions. For convenience, the five opinions addressing to the merits of plaintiffs' claims will referred to by numbers indicating their chronological order, as follows: Sprague v. General Motors Corp., 768 F. Supp. 605 (E.D. Mich. 1991) (*Sprague I*, rejecting contract claim of general retirees on summary judgment); 843 F. Supp. 266, 271 (E.D. Mich. 1994) (*Sprague II*, holding early retirement agreements granted early retirees vested benefits based extensive findings of fact drawn from the record of a lengthy bench trial); 857 F. Supp. 1182 (E.D. Mich. 1994) (*Sprague III*, holding GM estopped from adversely amending the plan as to early retirees, but not as to general retirees); *aff'd in part and rev'd in part,* 92 F.3d 1425 (6th Cir. 1996) (*Sprague IV*, panel decision affirming contract and estoppel holdings in favor of early retirees and remanding the general retirees' claims for reconsideration), *vacated and reh'g granted en banc*, 102 F.3d 204 (6th Cir. 1996); *aff'd in part and rev'd in part*, 133 F.3d 388 (6th Cir. 1998) (*Sprague V*, en banc decision reversing class certification and rejecting contract, estoppel and fiduciary breach claims of 114 named plaintiffs), *cert. denied*, 524 U.S. 923 (1998). The case also generated several opinions addressing the procedural issues of class certification and entitlement to jury trial, but these are not relevant to the current investigation.

2 *Sprague II*, 843 F. Supp. at 269.

3 *Sprague II*, 843 F. Supp. at 270, 272 n.3.

4 *Sprague I*, 768 F. Supp. at 608-09.

reserved the right to modify or terminate its retiree health care plan at any time.[5] In fact numerous changes were instituted over the years, but for a long period they were uniformly advantageous to retirees, making their health benefits more generous.[6] In addition to the summary booklets, GM stressed the value of lifetime no-cost health care in promoting its various early retirement programs, and many early retirees received a summary of the benefits that would be available to them, including cost-free retiree health care.[7] Early retirees signed a form accepting GM's early retirement offer and releasing the company from any claims relating to their separation. That document also stated that the employee had reviewed the post-employment benefits that would be available, and "accepts them."[8]

In 1988 GM modified its retiree health care plan, eliminating some benefits and imposing deductibles and copayments that could shift to each participant up to $750 per year of medical costs previously paid by GM.[9] The modifications affected approximately 84,000 retirees, including 50,000 early retirees or their surviving spouses.[10] Enormous amounts were at stake, for if GM could require the payments at issue, then it could terminate the plan and discontinue all retiree health benefits without incurring liability. A group of retirees brought suit to block the changes, asserting claims for breach of contract and promissory estoppel.[11]

Notwithstanding the complaint, *Sprague v. General Motors Corp.* was not an ordinary common law action, for an employee health care plan is not an ordinary contract. It is an extraordinary commitment governed exclusively by the Employee Retirement Income Security Act of 1974 (ERISA).[12] In essence, plaintiffs asserted that GM's retiree health care program could not be changed to the detriment of previously-retired workers—that the company had made a promise of lifetime paid-up health care that became irrevocable ("vested") upon

[5] *Sprague I*, 768 F. Supp. at 609.

[6] *Sprague II*, 843 F. Supp. at 304-05.

[7] *Sprague II*, 843 F. Supp. at 307-08.

[8] *Sprague II*, 843 F. Supp. at 300.

[9] *Sprague I*, 768 F. Supp. at 609; *Sprague II*, 843 F. Supp. at 274.

[10] *Sprague II*, 843 F. Supp. at 269, 270, 272 n.3.

[11] *Sprague I*, 768 F. Supp. at 607.

[12] Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 and I.R.C. §§ 219, 401-436, 4971-4975). In conformity with the common practice among employee benefit law specialists, citations to specific provisions of ERISA point to the section numbers of the original statute followed by a parallel citation to the location of the provisions in the U.S. Code.

retirement.[13] ERISA does indeed mandate prompt vesting of pension benefits, but no such requirement applies to health care or other employee welfare benefits.[14] As its name implies, ERISA is primarily concerned with retirement income security—the statute imposes detailed requirements on private pension plans, but while it ousts state law, it says almost nothing about the content of most welfare plans.[15] That is left to private arrangement, but if disputes arise ERISA's federal enforcement mechanism leaves the existence and extent of an employer's undertaking to provide health care benefits to be worked out by the federal courts.

In *Sprague* the retirees argued that the summary booklets GM distributed to participants created a binding contract to provide vested retiree health care, regardless of any restrictions or qualifications that might be contained in undisclosed plan documents.[16] Even if GM's general retiree health care plan was amendable, plaintiffs asserted, the early retirement agreements were a special deal that vested some 50,000 early retirees in lifetime no-cost health care.[17] Alternatively, General Motors' repeated oral and written assurances that it would provide salaried retirees with cost-free health care coverage for life, once relied upon by workers, bound the company by promissory estoppel.[18] In addition, plaintiffs contended that deceptive statements about health benefits made by high-ranking company officials in connection with early retirement programs breached their fiduciary duties.[19] The common element in each of these claims is the assertion that words matter under ERISA—that the extent of an employer's undertaking to provide employee benefits can be affected by representations made to participants that are at variance with the formal instruments by which the plan is constituted.

[13] *Sprague I*, 768 F. Supp. at 609 ("the central issue in this case is whether GM set out in the plan documents an agreement or 'private design' to vest health care benefits upon retirement").

[14] ERISA §§ 201(1), 203(a) (minimum vesting standards applicable to pension plans, not welfare plans), 29 U.S.C. § 1051(1), 1053(a).

[15] *See* ERISA § 201(1), 301(a)(1), 4021(a)(1), 29 U.S.C. §§ 1051(1), 1081(a)(1), 1321(a)(1) (2018) (welfare plan exclusions from participation, vesting, benefit accrual, antialienation, spousal protection, advance funding and PBGC insurance requirements applicable to pension plans). *But see* ERISA §§ 601-09, 701-34, 29 U.S.C. §§ (coverage, portability, and other minimum standards applicable to group health plans, but not other welfare plans).

[16] *Sprague I*, 768 F. Supp. at 610.

[17] *Sprague II*, 843 F. Supp. at 270, 271.

[18] *Sprague I*, 768 F. Supp. at 607; *Sprague III*, 857 F. Supp. at 1183-84.

[19] *Sprague V*, 133 F.3d at 404.

Do words matter under ERISA? Can the employer shade the truth, or even lie with impunity? The district court in *Sprague* held that the representations made by GM in connection with various early retirement programs created a special deal to provide early retirees cost-free lifetime health care,[20] and that GM's representations estopped it from relying on language in the original plan that reserved the right to amend or terminate coverage.[21] Workers who retired under GM's general retirement program (the "general retirees") had no vested right to continued health care, however, because the summary booklet, despite its language that "health care coverages would be provided at GM's expense for your lifetime," also warned that the program was subject to change.[22] A panel of the Sixth Circuit affirmed the decision with respect to the early retirees, and further held that general retirees who received plan summaries that promised lifetime benefits and did *not* contain an unambiguous reservation of GM's right to amend the plan could also prevail.[23] But on rehearing en banc, the Sixth Circuit ruled for GM on all counts.[24] Cynics might call it a tortured opinion that's better grounded in the proposition that what's good or General Motors is good for the country,[25] than in the law or the facts of the case. And General Motors was not alone: many other prominent large employers reneged on apparent promises of life-long no-cost retiree health care coverage.[26] Corporate management, it seems, can be a pack of lying thieves, and yet a federal statute

[20] *Sprague II*, 843 F. Supp. at 299, 319.

[21] *Sprague III*, 857 F. Supp. at 1189-92.

[22] *Sprague I*, 768 F. Supp. at 610-12. The district court also rejected the general retirees' estoppel claim because the Company's reservation of the right to amend the plan made the promise of lifetime benefits ambiguous, so that reliance thereon was neither reasonable nor justifiable. *Sprague III*, 857 F. Supp. at 1189.

[23] *Sprague IV*, 92 F.3d at 1438, 1440.

[24] *Sprague V*, 133 F.3d 388 (6th Cir. 1998), *cert. denied*, 524 U.S. 923 (1998).

[25] This aphorism is derived from a statement made by Charles E. Wilson, former president of General Motors, during hearings on his confirmation as Secretary of Defense in the Eisenhower Administration. *See* WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 787 (1978). *See also* 2 OSWALD SPENGLER, THE DECLINE OF THE WEST 345 (Charles Francis Atkinson trans. 1928) ("Law is the property of the powerful. Their law is the law of all.").

[26] A policy-based critique of *Sprague* and similar cases is presented *infra* Part III.B.2. Two related factors triggered a rush to limit or terminate retiree health care benefit programs in the 1990s. One was continuing escalation in health care costs. The second was the pronouncement by the Financial Accounting Standards Board (FASB) requiring accrual of the expected cost of post-retirement benefits (instead of the prior practice of accounting for retiree health care on a pay-as-you-go basis), and financial statement disclosure of the employer's accumulated postretirement benefit obligation. *See* FASB, Statement of Financial Accounting Standard No. 106: Employers' Accounting for Postretirement Benefits Other Than Pensions (1990) (effective for fiscal years beginning after December 15, 1992). This change in generally accepted accounting principles forced many large companies to report staggering—and stock-price depressing—new balance sheet liabilities. *See, e.g.*, John Mintz & Kathleen Day, *Health Cares' Painful Changes: More Retirees Are Left in the Lurch as Firms Slash Health Coverage*, WASH. POST, Feb. 28 1993, at H1.

enacted to provide reliable information, improve career and financial planning, and protect workers' interest in benefits, craftily construed, grants no relief.

An obligation of good faith and fair dealing normally attends relations between contracting parties.[27] And tort law ordinarily imposes liability for fraudulent misrepresentation (deceit) where a representation is materially misleading because it fails to state qualifying matter,[28] or where the maker knows a representation to be ambiguous and intends it to be understood in a sense which is false.[29] Apparently, these principles do not apply to representations concerning pension or welfare benefit plans. In part that's because ERISA's express preemption clause, which is "conspicuous for its breadth,"[30] sweeps aside state common law of contracts and torts insofar as they "relate to any employee benefit plan".[31] So the question becomes, does ERISA itself, or federal common law developed thereunder,[32] provide any relief for injuries resulting from false or misleading information about employee benefits? Should it?

This article addresses these and related questions. Careful review of the purpose and scope of ERISA's disclosure rules, combined with critical assessment of case law limitations on ERISA's remedies, reveal troubling gaps and weaknesses in the contract law dimension of pension and welfare benefit programs. In origin ERISA "was, at its core, a 'reasonable expectations' bill. It gave an ordinary employee the assured right to receive what a reasonable person in his boots would have expected in the circumstances."[33] Over time the protection of workers' reasonable expectations has become mired in confused and opaque doctrinal

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[27] RESTATEMENT (SECOND) OF CONTRACTS § 205; U.C.C. §§ 1-103, 2-103(b), 2-305(2). On the meaning of good faith and fair dealing, *see* 1 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.26c (1990), 2 *id*. § 7.17a.

[28] RESTATEMENT (SECOND) OF TORTS §§ 525, 529 (1977).

[29] RESTATEMENT (SECOND) OF TORTS § 527.

[30] FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990). *Accord* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987) (characterizing the language of ERISA § 514(a)'s express preemption clause as "deliberately expansive").

[31] ERISA § 514(a), (c)(1), 29 U.S.C. § 1144(a), (c)(1) (providing that superseded state law includes "all … decisions … having the effect of law").

[32] Senator Jacob Javits, a principal sponsor of comprehensive pension reform legislation, emphasized during final consideration of the conference committee report on ERISA that "[i]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29,942 (1974), *reprinted in* 3 SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR AND PUB. WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 4747, 4771 (Comm. Print 1976) [hereinafter ERISA LEGISLATIVE HISTORY].

[33] Frank Cummings, *ERISA: The Reasonable Expectations Bill*, 65 TAX NOTES 880, 881 (1994) ("Primarily, it was a consumer protection bill.").

refinements. The federal courts lost sight of ERISA's contract law core, failing to develop a robust understanding of the employer's promissory obligation. In the process, many apparent commitments to compensate employees with retirement savings, health care coverage, disability insurance, or other welfare benefits have been rendered unreliable. On close examination, employer assurances of pension or welfare benefits are frequently unbelievable.

ERISA has been hailed as a landmark achievement in labor and social welfare legislation.[34] Congress declared as its central goal "to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries".[35] That was to be accomplished in large part by "requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect [to employee benefit plans] ... and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."[36] Despite the suggested functional link, serious disconnects have arisen between disclosure and judicial enforcement. Those rifts cause widespread defeated expectations and are the focus of this study.

This article proceeds in four parts. A policy introduction examines the functions of disclosure and how those functions inform (or should inform) the content of disclosure (Part I). Wise choices about one's personal finances (e.g., assessing needs for additional savings or insurance) and career path (e.g., evaluating alternative jobs or retirement dates) require an understanding of the essential features of employee benefit programs. Congress envisioned simplified disclosure as a tool that would avoid costly miscalculations and enhance economic performance. The principal tool was to be the summary plan description, or SPD, which, "written in a manner calculated to be understood by the average plan participant," would "reasonably apprise … participants and beneficiaries of their rights and obligations under the plan."[37]

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[34] *E.g.*, JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 1 (2004) (describing ERISA as "landmark legislation" and quoting Senator Jacob Javits that ERISA represented "the greatest development in the life of the American worker since social security"); Norman P. Stein & James A. Wooten, *Foreword*, 6 DREXEL L. REV. 257 (2014) ("ERISA [was] arguably the last major piece of social legislation" of the twentieth century).

[35] ERISA § 2(b), 29 U.S.C. § 1001(b) (2018).

[36] *Id.*

[37] ERISA § 102(a), 29 U.S.C. § 1022(a) (2018)

Despite that objective, the SPD evolved from an understandable summary into a bloated inscrutable disclaimer of warranties. Part II chronicles the demise of the requirement that participants and beneficiaries be provided an understandable summary of plan terms. To avoid liability for injuries attributable to insufficient knowledge, plan sponsors larded their "summaries" with more and more detail, often expressed using complex syntax and unfamiliar jargon. SPDs morphed into behemoth documents sometimes extending 100 pages or more.[38] As guides for planning major life decisions, most contemporary SPDs might as well be written in Sanskrit.

Although understandability fell by the wayside, starting in the 1980s courts intervened to impose liability for some harms traceable to a mistaken or incomplete SPD. Over time, however, doctrinal conditions limiting access to monetary relief appeared. Part III traces erosion of the requirement that the SPD be reliable—that it convey information "sufficiently accurate and comprehensive to reasonably apprise … participants and beneficiaries of their rights and obligations under the plan."[39] That erosion is revealed by exploration of the legal consequences of three common SPD defects: summary reports of plan features that are inconsistent with the terms of the underlying plan,[40] self-contradictory,[41] or dangerously incomplete.[42]

From a broader perspective the non-enforcement of the understandability norm, combined with the erosion of the reliability norm, reduce judicial workloads and expand employers' freedom of action. Those developments rehearse an ahistorical interpretive dynamic that has similarly undercut the scope and stringency of ERISA's fiduciary regime.[43] Unfortunately, it's hard to escape the conclusion that the federal courts silently remade ERISA disclosure law in derogation of Congress' larger objective, enhanced economic efficiency through better plans and better-informed worker decision-making.

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[38] *See infra* notes 310-311 and accompanying text.

[39] ERISA § 102(a), 29 U.S.C. § 1022(a) (2018).

[40] *See infra* Part III.A.

[41] *See infra* Part III.B.

[42] *See infra* Part III.C.

[43] *See* Peter J. Wiedenbeck, *Untrustworthy: ERISA's Eroded Fiduciary Law*, 59 WM & MARY L. REV. 1007, 1088-89, 1093-96 (2018).

Part IV explores whether the understandability norm could be revived, and if so, at what cost. The planning function could be resurrected with a few limited extensions of current ERISA disclosure law. To create an incentive to make the SPD understandable, plan sponsors should face liability for losses that a clear warning or straightforward explanation would prevent. Exposing the SPD drafter to liability for telling workers either too much (not understandable) or too little (not sufficiently accurate and comprehensive) as determined by a judge in hindsight would create a fearful Catch-22 driving employers away from plan sponsorship. Consequently, a zone of immunity for reasonable albeit imperfect attempts to strike a balance between understandable and reliable information is essential. Subjecting the plan administrator's discretionary compromise between understandable and reliable disclosures to limited judicial review under the abuse-of-discretion standard could secure necessary breathing room. The impetus for such a revolution in SPD drafting and ERISA disclosure law is unlikely to come from Congress or the courts, but the Labor Department has ample authority under the current statute to force fundamental change through rulemaking.

I. DISCLOSURE POLICY[44]

A. Functions of Disclosure

ERISA demands routine disclosure of three kinds of information: (1) the terms of the plan; (2) the current financial status of the plan; and (3) the participant's current entitlement to benefits under a pension plan.[45] These regular disclosures are supplemented by the right of access to more detailed information: the instruments under which the plan is operated must be available for examination, and a copy must be provided by the administrator upon written request from a participant or beneficiary.[46] Beyond these central information-sharing obligations, ERISA also imposes many highly-granular disclosure requirements, which are specific to particular types of plans or are triggered by specific events.[47]

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[44] This overview of disclosure policy is drawn in large part from Peter J. Wiedenbeck, Refining Mandated Disclosure: Statement Presented to the ERISA Advisory Council, June 6, 2017, Washington University in St. Louis Legal Studies Research Paper No. 17-06-01, available at SSRN: https://ssrn.com/abstract=2982433.

[45] ERISA §§ 102, 104(b)(3), 105 (summary plan description, summary annual report, and pension benefit statement, respectively), 29 U.S.C. §§ 1022, 1024(b)(3), 1025 (2018).

[46] ERISA § 104(b)(2), (4), 29 U.S.C. § 1024(b)(2), (4) (2018).

[47] Since ERISA's enactment the number of required notifications and reporting obligations has proliferated. The September 2017 edition of a Labor Department guide to information obligations contains a chart, "Overview of ERISA Title I Basic Disclosure Requirements," that runs to 14 pages, and is followed by a three-page chart giving an "Overview of Basic PBGC Reporting and Disclosure Requirements." U.S. DEPARTMENT OF LABOR,

Disclosure was not an end goal of Congress in enacting ERISA. Disclosure was adopted as a means to serve broader legislative objectives. First, disclosure was adopted to promote compliance with and enforcement of statutory obligations. Transparency was expected to dissuade plan fiduciaries from breaching their duties[48] and to equip participants and beneficiaries with information necessary to recognize defalcations and bring suit to remedy them.[49] Disclosure would "enable employees to police their plans" and committee reports explained that "the safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to

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REPORTING AND DISCLOSURE GUIDE FOR EMPLOYEE BENEFIT PLANS (2017), at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/reporting-and-disclosure-guide-for-employee-benefit-plans_0.pdf. Similarly, an IRS guide of tax reporting obligations nearly fills 16 pages. IRS RETIREMENT PLAN REPORTING AND DISCLOSURE REQUIREMENTS (2018), at https://www.irs.gov/pub/irs-tege/irs_reporting_disclosure_guide.pdf.

[48] The objective of deterring abuses through disclosure substantially predates ERISA. It was a central goal of ERISA's predecessor statute, the Welfare and Pension Plans Disclosure Act of 1958, Pub. L. No. 85-836, 72 Stat. 997 (repealed 1974) [hereinafter WPPDA]. *See generally* U.S. DEPARTMENT OF LABOR, LEGISLATIVE HISTORY OF THE WELFARE AND PENSION PLANS DISCLOSURE ACT OF 1958 AS AMENDED BY PUBLIC LAW 87-420 OF 1962, at 122-65 (1962) [hereinafter WPPDA LEGISLATIVE HISTORY].

> Complete disclosure of the details of welfare and pension plan operations provides the most effective singe deterrent against abuses and the many other weaknesses of these plans. It would provide the greatest incentive to good management and investment policies and the best protection to the interests and rights of employees, employers, and the Government alike.

S. Rep. No. 85-1440, at 17 (1958), *reprinted in* WPPDA LEGISLATIVE HISTORY, *supra* at 135.

> [I]t is the belief of the committee that legislation which will enable the participants and beneficiaries of pension and welfare benefit plans to obtain the facts with respect to their operation will permit self-policing and self-appraisal of these plans by the participants and beneficiaries. With such information [they] will be in a better position to seek relief under existing laws of the various States and the Federal Government against malpractices which may occur in the management and operation of such plans.

H.R. Rep. No. 85-2283, at 9 (1958), *reprinted in id.* at 139-40. Despite its goal of deterring mismanagement and abuse, the WPPDA conferred neither fiduciary protections nor other substantive rights on plan participants and beneficiaries, nor did it offer any federal enforcement mechanism. Indeed, as amended in 1962 the WPPDA expressly declared that "[n]othing contained in this Act shall be so construed or applied as to authorize the Secretary [of Labor] to regulate, or interfere in the management of, any employee welfare or pension benefit plan". WPPDA § 9(h), Pub. L. No. 87-420, § 15(b), 76 Stat. 35, 37-38 (1962) (repealed 1974). A 1965 Cabinet committee report noted that fiduciary accountability depends on information access and recommended strengthening WPPDA disclosure provisions, but stopped short of endorsing federal fiduciary obligations or enforcement. PRESIDENT'S COMM. ON CORPORATE PENSION FUNDS AND OTHER PRIVATE RETIREMENT AND WELFARE PROGRAMS, PUBLIC POLICY AND PRIVATE PENSION PROGRAMS xv-xvi, 77-79 (1965). By the mid-1960s the WPPDA was widely deemed ineffective. *See* Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, *in* STAFF OF THE S. SPECIAL COMM. ON AGING, 98TH CONG., THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE, 1, 6-8 (Comm. Print 1984); JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 45-50 (2004).

[49] In contrast to the absence of substantive rights and federal enforcement mechanisms under the WPPDA, *supra* note 48, ERISA's disclosure regime is coupled with exacting federal fiduciary obligations and a civil enforcement scheme that empowers participants and beneficiaries to bring private suits to vindicate their rights under the terms of the plan and ERISA, including actions to prevent or remedy breaches of fiduciary obligations. ERISA §§ 401-414, 502, 29 U.S.C. §§ 1101-1114, 1132 (2018).

inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general."[50]

Second, disclosure allows participants and beneficiaries to better plan their affairs and thereby derive maximal advantage from a pension or welfare plan. That advantage might come in the form of *career planning*. For example, disclosure allows workers to compare the benefit packages associated with alternative employment opportunities; to determine when a job change could be made without forfeiting accrued pension benefits (vesting);[51] or to evaluate the financial consequences of alternative retirement dates. Similarly, access to information can yield better *financial planning*. For example, it can enable pension plan participants to determine the extent of additional individual savings (in an IRA or on an after-tax basis) that may be needed to provide sufficient resources in retirement. And knowledge about welfare benefit plans can assist workers in making good decisions about whether they need to save for health care expenses that are not covered by the employer's plan (out-of-pocket costs), or to secure additional life insurance or disability income protection. This planning function serves the goal of increasing economic efficiency.

Relatedly, disclosure also promotes the exchange of ideas and sharing of experiences within the workforce and between employees and their employer.[52] Mandated disclosure offers

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[50] S. Rep. No. 93-127, at 27 (1973), *reprinted in* 1 ERISA LEGISLATIVE HISTORY, *supra* note 32, at 587, 613; H.R. Rep. No. 93-533, at 11 (1973), *reprinted in* 2 ERISA LEGISLATIVE HISTORY, *supra* note 32, at 2348, 2358.

[51] John Erlenborn, Republican House manager of the bill that became ERISA, observed:

> [I]f people do have this sort of meaningful information made available to them, I think some of the unwarranted expectations that gave rise to the horror stories that people were not getting what they anticipated will be a thing of the past, because many of them are based on what people anticipated getting that they never were entitled to, because they did not honestly know what was in their pension plan; they did not honestly know what their rights would be.

120 Cong. Rec. 4284 (1974), *reprinted in* 2 ERISA LEGISLATIVE HISTORY, *supra* note 32, at 3386–87. *See* 120 Cong. Rec. 29,195-96 (1974), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra* note 32, at 4665 (remarks of Rep. Dent) (Rep. Erlenborn "insisted from the very beginning that a complete and full disclosure of a pension participant's standing within the pension plan be made available, and that it should be written in such a way that individuals would understand exactly what his position was," calling this "one of the cornerstones of reform").

[52] In *CIGNA Corp. v. Amara*, 563 U.S. 421, 444 (2011), the Court observed:

> In the present case, it is not difficult to imagine how the failure to provide proper summary information, in violation of the statute, injured employees even if they did not themselves act in reliance on summary documents—which they might not themselves have seen—for they may have thought fellow employees, or informal workplace discussion, would have let them know if, say, plan changes would likely prove harmful.

workers indirect notification of important benefits-related issues.[53] It can also stimulate feedback that alerts the plan sponsor to workers' compensation and benefit priorities and shared concerns about existing benefit programs.[54]

These three objectives of disclosure will be called the compliance function, the planning function, and the collaboration function. In some circumstances, the form and content of disclosures might be tailored to the principal objective of a particular release of information. Where compliance is the main goal, for example, detailed reporting of financial transactions between related parties or involving a conflicted decision maker might be appropriate, even though the large majority of workers would not understand or attend to the information. If the data is public, one or a few suspicious employees (or union officials) consulting a professional could be all that it takes to trigger enforcement efforts. In contrast, if better career or financial planning is the goal, disclosures should be geared to the level of education and financial sophistication of the workforce, because each participant needs to integrate the information into his or her own life decisions. Hence information must be distilled and conveyed in a simplified presentation to derive maximum benefits from disclosure. At least eleven provisions of ERISA demand disclosure of specified information "written in a manner calculated to be understood by the average plan participant".[55] Such understandability requirements impose special challenges, and are a main focus of this policy discussion and the succeeding analysis of disclosure case law.

This collaborative function of disclosure is perhaps an unforeseen consequence of the statute—a post-enactment judicial construct. Yet like worker career and financial planning, it too has efficiency implications.

[53] At oral argument in *Amara*, *id.*, Justice Kagan observed:

> Very few people read their SPDs, but you only need one person to read the SPD to come in and say, by the way, folks, 21,000 of us are not getting our retirement benefits for the next few years, and within a day every employee in the workplace is going to know about that.

Transcript of Oral Argument at 55, CIGNA Corp. v. Amara 563 U.S. 421 (2011) (No. 09-804).

[54] This feedback (or push-back) function is especially pronounced under ERISA § 204(h), 29 U.S.C. § 1054(h) (2018), which prohibits giving effect to defined benefit pension plan amendments that would significantly reduce the rate of future benefit accruals unless affected individuals have been provided reasonable advance notice.

The opportunity for workers to respond and object is also implicated, albeit less conspicuously, in the welfare plan context. Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry., 520 U.S. 510 (1997), interpreted ERISA's anti-interference rule, ERISA § 510, 29 U.S.C. § 1140, to prohibit adverse employment action undertaken to prevent accrual of as-yet-unearned welfare benefits. Absent voluntary (contractual) vesting, an employer can shut down a welfare plan at any time, but *Inter-Modal Rail* demands that it do so openly and forthrightly by following the plan amendment process. The plan sponsor cannot by adverse employment action "'informally' amend their plans one participant at a time", 520 U.S. at 516, declared the Court, which forces the plan sponsor to own up to a systemic change and take the heat.

[55] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, PRIVATE PENSIONS: CLARITY OF REQUIRED REPORTS AND DISCLOSURES COULD BE IMPROVED 71 (2013).

It bears emphasis that each of these functions—compliance, planning, and collaboration—requires that the information disclosed be reliable. Importantly, planning requires more: the distributed information must be *both* reliable *and understandable*. Careful plans founded on invalid data won't enhance economic efficiency. Nor can lives be improved with accurate information conveyed in a way that workers can't understand and exploit.

B. Optimal Disclosure

The two essential criteria just mentioned—that information disclosed must be both reliable and understandable—are embedded in several of ERISA's key disclosure mandates. The premier example, ERISA section 102(a), provides:

> A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 U.S.C. §1024(b)]. The summary plan description shall include the information described in subsection (b), 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. A summary of any material modification [hereafter SMM] in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1) [29 U.S.C. § 1024(b)(1)].[56]

This directive embodies the functional imperative highlighted above. To achieve ERISA's objectives, disclosures must be both understandable—otherwise they *will not* be used—and sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of their rights and obligations—for incorrect or dangerously incomplete information *should not* be used.

Congress embedded this tension between understandable and reliable information in ERISA, fixing a central quandary at the heart of its disclosure regime. And it was wise to do so, in view of the planning function of disclosure. Abridgement and simplified expression make information accessible, but often create the impression that general explanations and illustrations are not subject to qualification or exceptions in special circumstances. In contrast, excessive detail inhibits utilization and so operates to obscure the principal features, conditions, and limitations of the benefit plan.

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[56] ERISA § 102(a), 29 U.S.C. § 1022(a) (2018).

Enhanced economic efficiency requires some sacrifice of comprehensiveness. Full disclosure—a mass data dump, as by distributing all operative plan documents—would be meaningless to virtually all participants.[57] In theory, private information intermediaries could perform the translation and filtering needed to render disclosures understandable. In an earlier era unions were positioned to undertake that task for many workers, but the decline of collectively-bargained plans leaves the large majority of employee benefit plan members without access to that information source.[58] At first glance it would seem that the enormous wealth accumulated in private pension plans—some $9.2 trillion as of 2018[59]—might support a private market for expert advice, so perhaps certified financial planners could be enlisted. Average plan accumulations, however, are quite modest,[60] which restricts the amount that could be charged

[57] The WPPDA had called for full disclosure of a sort. It required the administrator of a welfare or pension plan to prepare a "description of the plan" which was required to include "copies of the plan or of the bargaining agreement, trust agreement, contract, or other instrument, if any, under which the plan was established and is operated". WPPDA §§ 5(a), 6(b), 29 U.S.C. §§ 304(a), 305(b) (1970) (repealed 1974). This plan description was required to be filed with the Labor Department, and any participant or beneficiary who submitted a written request was entitled to receive a copy. WPPDA § 8, 29 U.S.C. § 307 (1970) (repealed 1974). Thus, under the WPPDA the complete terms of the plan were available, but were not routinely distributed to workers covered by the plan.

Experience showed the WPPDA's approach to informing participants to be ineffective. By 1972, comprehensive pension reform legislation introduced by Senators Harrison Williams and Jacob Javits called for furnishing understandable summaries to participants as a matter of course. Retirement Income Security for Employees Act of 1972, S. 3598, 92d Cong. §§ 505, 507(b), 118 CONG. REC. 16,908, 16,915, 16,916 ("administrator shall furnish to every participant upon his enrollment in the plan ... a summary of the plan's important provisions ... written in a manner calculated to be understood by the average participant"). The report of the Senate Committee on Labor and Public Welfare explained:

> An important issue relates to the effectiveness of communication of plan contents to employees. Descriptions of plans furnished to employees should be presented in a manner that an average and reasonable worker participant can understand intelligently. It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets. Subcommittee findings were abundant in establishing that an average plan participant, even where [he] has been furnished an explanation of his plan provisions, often cannot comprehend them because of the technicalities and complexities of the language used.

S. Rep. No. 92-1150, at 10 (1972). *Accord id.* at 37-38.

[58] In 2018 there were 107 million total participants in noncollectively-bargained private pension plans, compared to 32.5 million in collectively-bargained plans. EBSA, PRIVATE PENSION PLAN BULLETIN: ABSTRACT OF 2018 FORM 5500 ANNUAL REPORTS, Table A6 at 10 (2021), at https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2018.pdf. In 1991 there were 58 million total participants in noncollectively-bargained plans with 25 million in collectively-bargained programs. PENSION & WELFARE BENEFITS ADMINISTRATION, PRIVATE PENSION PLAN BULLETIN: ABSTRACT OF 1991 FORM 5500 ANNUAL REPORTS, Table A8 at 14 (1994).

[59] *Id.* EBSA, *supra* note 58, at 2, 3.

[60] Labor Department data indicate that in 2018 the average amount of assets per participant in private single-employer defined benefit plans was $102,973, while the average account balance for private single-employer defined contribution plans was only $60,786. Author's calculation from EBSA, *supra* note 58, at 19, 20.

to most participants for advisory services.[61] Variations between the terms of plans of the same type sponsored by different employers elevate the cost offering such guidance. The business feasibility of a private market for individual advisory services pertaining to health or other welfare plans is even more suspect. These considerations indicate that, as a practical matter, only the employer is in a position to provide understandable, actionable information to facilitate employee career and financial planning.

The shift from traditional defined benefit pension plans to defined contribution programs—including 401(k) plans and other varieties of profit-sharing and stock bonus plans—has worked a partial standardization of retirement savings programs. The period since about 1990 has seen a massive transformation of the retirement plan universe. Traditional defined benefit pension plans—the norm when ERISA was enacted—are now much less common.[62] (Many of those that survive are frozen plans, under which workers earn no additional benefits.) In their place, many companies have instituted 401(k) plans, which are far simpler programs that workers intuitively grasp, as they function much like a savings account.[63] Not only have 401(k) plans become the overwhelmingly dominant type of pension plan, the variability in features between one employer's program and another's has decreased dramatically. Today, most 401(k) plans provide immediate or very rapid vesting; typically participants must select investments from a limited menu of mutual funds;[64] that menu often designates a suite of target date funds as the default investment choice; life annuity forms of distribution are typically

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[61] Unlike securities analysts, employee benefits specialists cannot profit from their expertise by trading for their own account. *See* Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715, 749-50, 781-82 (1997) (showing that capital investors are less vulnerable to misinformation than workers and benefit from private information monitoring devices that don't exist in the labor market).

[62] EMPLOYEE BENEFITS SECURITY ADMINISTRATION (EBSA), PRIVATE PENSION PLAN BULLETIN HISTORICAL TABLES AND GRAPHS 1975–2018, at 1-2 (2021) reports that from 1975 to 2018 the number of private defined benefit pension plans declined from 103,346 to 46,869, while the number of defined contribution plans increased from 207,748 to 675,007. More importantly, the number of defined benefit plan participants went from 33,004,000 in 1975 to 33,967,000 in 2018, in which time defined contribution plan participation rose from 11,507,000 to 105,846,000. *Id.* at 5-6. Looking to *active* participants (employees earning increased retirement savings based on current service) the change is even more dramatic: there has been a 50% decrease in active participation in DB plans; and a more than seven-fold increase for DC plans. *Id.* at 9-10.

[63] Elective contribution programs (cash-or-deferred arrangements) were virtually nonexistent when ERISA was enacted. MATTHEW P. FINK, THE RISE OF MUTUAL FUNDS 127-29 (2009); *see* ERISA, Pub. L. No. 93-406, § 2006, 88 Stat. 829, 992-93 (temporary freeze on salary reduction regulations), *superseded by* I.R.C. § 401(k), Pub. L. No. 95-600, § 135, 92 Stat. 2763, 2785 (1978). First authorized by statute in 1978, 401(k) plans became popular by the late-1980s. In 2018 there were 588,499 401(k) plans covering 70,335,000 active participants. EBSA, *supra* note 62, at 31-32.

[64] EBSA, *supra* note 58, Table D5(b), at 55 (94% of active 401(k) plan participants direct all investments).

unavailable;[65] and single sum distribution upon separation from service is almost always allowed. Speaking broadly, the market has converged on 401(k) plans as the principal retirement savings vehicle, and many 401(k) plan terms have largely become standardized and familiar.[66] This greatly reduced variability might seem to decrease the incremental value of plan-specific summary disclosure. Yet the market's embrace of the defined contribution paradigm arguably amplifies the need for straightforward understandable notice. Substitution of individual account plans for traditional pensions shifts the risk of poor investment performance from plan sponsors to employees; casting responsibility for investment decisions on participants (who are often financially unsophisticated and inexperienced investors) makes them bear the consequences of high-stakes life-altering decisions.[67] Because retirement saving is a long-term endeavor, do-overs are not available, and mistakes compound. Therefore even if the main features of 401(k) plans feel familiar to many workers, effective disclosure of the potential implications of their action (or inaction) may be even more important now than in the former world dominated by defined benefit pensions. The enormous escalation in health care costs over recent decades, followed by responsive health plan amendments shifting more cost and risk to employees (e.g., introducing or expanding coverage exclusions, co-pays, deductibles, co-insurance requirements, and premium contributions) exposes workers to similar insecurity with respect to medical costs. Hence summary disclosure remains important, and the plan sponsor alone can efficiently distill the information.

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[65] ERISA Advisory Council, *Advisory Council Report on Spend Down of Defined Contribution Assets at Retirement* (2008), at https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2008-spend-down-of-defined-contribution-assets-at-retirement, observed:

> Based upon 2005 Form 5500 filings, there were 631,000 defined contribution plans covering 75 million participants. It is estimated that only 25% of covered participants are in plans that offer annuity features and utilization of annuities in those plans is extremely low. In fact, recent research conducted by Hewitt Associates LLC showed that over 90% of participants offered a lump sum, take that option over an annuity distribution.

SJ. Mark Iwry et al., *When Income Is the Outcome: Reducing Regulatory Obstacles to Annuities in 401(k) Plans* 4 (2019), at https://www.brookings.edu/wp-content/uploads/2019/07/ES_201907_IwryGaleJohnJohnson.pdf .

[66] Query whether this herding reflects market convergence or market collapse? Ineffective disclosure might be a contributing cause of the trend toward 401(k) plans with very similar features. If retirement savings plan disclosures are considered untrustworthy or incomprehensible by plan participants, workers would act on the assumption that all such plans offer only some baseline value. If workers do not put a premium on a better plan, it becomes uneconomic for an employer to offer a more costly higher-quality program, and soon only baseline value plans subsist. This collapse, of course, is characteristic of a "lemons" market. *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. Econ. 488 (1970). Lack of fraud protection in the labor market may trigger such decay. Greenfield, *supra* note 61, at 743-44, 753.

[67] *See supra* note 64. *See generally* TERESA GHILARDUCCI, WHEN I'M SIXTY FOUR 58-138 (2008); EDWARD A. ZELINSKY, THE ORIGINS OF THE OWNERSHIP SOCIETY (2007).

At the other extreme from full disclosure, overbroad statements like "the company's pension plan generally pays *X*% of your average compensation each year following retirement," or "our health care plan fully covers a typical family's medical needs," give no notice of crucial exceptions and limitations. Instead of facilitating planning, such extreme simplification can lead workers to ruin. Clearly, the planning function demands compromise between readily understandable and reasonably reliable information.

The level of detail required of the SPD is at best vaguely indicated. Information is costly, and it would be wasteful to induce the employer to provide more than needed. When the benefit of better-informed decision making for some workers (better career and financial planning) is outweighed by the costs of providing particularized information that is relevant to their special circumstances, then inclusion in the SPD would be unwise. Those costs include the costs of drafting, reviewing, and publishing the additional information, and most importantly, the cost of information overload—other workers will be deterred from making use of the SPD as it becomes more detailed, lengthy and complex. The SPD definition directs that plan administrators find a middle ground. A comprehensible warning of broadly applicable conditions, limitations, and exclusions is required because the summary must "be sufficiently accurate and comprehensive to *reasonably* apprise such participants and beneficiaries of their rights and obligations under the plan."[68] But that cannot be taken too far. To convey information that can be understood and profitably acted upon by the many, some details must be omitted, even if occasional unpleasant surprises crop up for the few, who due to unusual circumstances have their applications for benefits denied based on plan terms not reflected in the summary.

Rather than demanding full disclosure, the SPD aims to achieve *optimal* disclosure, which requires a sensitive balance between "understandable" and "accurate and comprehensive" (i.e., reliable). The governing principle, "to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan,"[69] is acutely sensitive to context, including the specific terms of the plan and the experience and capabilities of participants. The SPD obligation prescribes a standard, not a rule. It's a standard which is applied, in the first instance, by the plan administrator, who is tasked with curating plan information.[70] Hence the

[68] ERISA § 102(a), 29 U.S.C. § 1022(a) (2018) (emphasis added), quoted *supra* text accompanying note 56.

[69] *Id.*

[70] ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1) (2018).

incentives under which the plan administrator operates in formulating the SPD should be taken into account when assessing the likelihood that an appropriate balance—*optimal* disclosure—will result.

C. Incentives

Abridgement and simplified expression make information realistically accessible, but often create the impression that general explanations and illustrations are not subject to qualification or exceptions in special circumstances. In contrast, excessive detail inhibits utilization and obscures the principal features, conditions, and limitations of the benefit plan. Getting this central trade-off right is the objective of the SPD, but can it be achieved by the plan administrator?

Employee benefit plans are instituted voluntarily to serve the employer's ends, which may include increasing the firm's attractiveness in relevant labor markets, reducing workforce turnover, or increasing productivity. These objectives cannot be obtained without publicizing the advantages of the program to obtain workers' cooperation. To garner maximum advantage from employee benefit programs, plan sponsors need workers to place a high value on them. Left unsupervised, some plan sponsors (particularly those facing an uncertain future) would be inclined to tout the program by ignoring or downplaying conditions or limitations on plan benefits. This, of course, explains ERISA's insistence that the SPD contain information concerning "the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits".[71] The federal courts have endeavored to effectuate that goal by giving relief to disappointed claimants misled by an SPD that fails to notify of important limits or risks.[72] In those cases, failure to adequately warn triggers liability to the disappointed participant or beneficiary, who is authorized to bring a civil action to obtain "appropriate equitable relief to ... redress violations" of ERISA title I.[73]

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[71] ERISA § 102(b), 29 U.S.C. § 1022(b) (2018).

[72] The failure-to-warn line of cases is discussed *infra* Part III.C.1.

[73] ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2018). Because the benefits sought based on the faulty contents of the SPD are not actually authorized by the terms of the plan, the relief granted is not technically a benefit payment. Instead, it represents an award of "appropriate equitable relief" to remedy the violation of ERISA, namely, publishing a defective SPD. Commonly, such equitable relief comes by way of estoppel, but in appropriate cases plan reformation or surcharge may be appropriate remedies. *See infra* Part III.A.

As chronicled below, the prospect that failure to warn may render undisclosed conditions unenforceable triggered defensive moves that undercut understandable, effective disclosure.[74] Reacting to legal exposure, many plan sponsors converted the SPD into a liability shield, which, like a merchant's disclaimer of all warranties, express or implied, was written by lawyers for lawyers. Purported plan "summaries" ballooned in length and complexity, becoming well-nigh incomprehensible, and useless as practical guides for workers' career and financial decision-making. Such protective expatiation obscures plan fundamentals and defeats the purpose of the SPD, because too much information will be ignored rather than sifted and analyzed.[75] The overly-detailed and technically-worded liability-shield approach to drafting fails to deliver actionable information that workers can exploit to improve their lot. Thus, as courts moved to enforce reliability, plan sponsors responded by sacrificing understandability.

Participants won't use a bloated legalistic SPD, but the plan sponsor cannot afford to have workers undervalue the benefits provided. Employers issue opaque liability-shield disclosures because they're able to use other methods of publicizing the advantages of the plan via non-SPD communications, and in doing so they face minimal risk of liability for inaccurate or misleading representations.[76] ERISA disclosure mandates cannot function as intended—facilitating workers' career and financial planning—without some mechanism to induce optimal disclosure. Existing law's unbalanced incentive structure cannot produce that equilibrium. The plan administrator risks liability if participants and beneficiaries are not told enough, but supplying more information than plan members can process escapes liability. While the understandability norm has not been enforced to date,[77] it could still be revitalized.[78]

II. UNDERSTANDABILITY'S DEMISE

ERISA disclosure law was originally envisioned as "one of the cornerstones of [pension] reform".[79] The policy of advancing economic efficiency by facilitating workers' career and

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[74] *See infra* Part II.

[75] *See* CIGNA Corp. v. Amara, 563 U.S. 421, 438 (2011) ("we fear that the Solicitor General's rule [that the language of the SPD should be treated as contractually binding] might bring about complexity that would defeat the fundamental purpose of the summaries").

[76] *See infra* Part IV.D.

[77] *See infra* Parts II, IV.

[78] *See infra* Part IV.

[79] *See supra* note 51; *see also* Remarks of Daniel Halperin, *in* Panel Discussion, *Some New Ideas and Some New Bottles: Tax and Minimum Standards*, *in* Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL

financial planning has been subjugated, over time, to the competing interest in employer autonomy. The consumer protection impulse of the legislation's proponents—to give "an ordinary employee the assured right to receive what a reasonable person in his boots would have expected in the circumstances"[80]—points toward a system of understandable and readily enforceable benefit commitments. That approach would insist that the deal as advertised to workers fix the benefits workers actually obtain, without regard to obfuscatory disclaimers and undisclosed conditions and limitations. As such, workers could count on getting what they were sensibly promised, which points toward a legal regime mandating understandable benefit commitments enforced against the employer without proof individual reliance by the employee.

Congress was not single-mindedly consumer protective, however. Apart from its mandatory minimum standards concerning discrete issues of pension plan content (including vesting, funding, spousal protection, antialienation, and defined benefit plan termination insurance), ERISA leaves employers free to set the terms of the pension contract.[81] And in the case of welfare benefit plans this residual employer autonomy amounts to unalloyed laissez faire—virtually complete freedom of contract.[82] Flexibility to design the plan to best serve the employer's objectives, secured by ERISA's broad preemption of state laws, was an acknowledgement that employee benefit plans are voluntary programs.[83] As such, legislated quality controls, if taken too far, would retard the growth of benefit programs.[84] Accordingly,

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L. REV. 385, 399 (2014) (observing that greater retirement plan coverage was not the focus of ERISA, instead, "The focus was saying, 'You can promise whatever you want, but if you promise it, you got to deliver it.'").

[80] Cummings, *supra* note 33 and accompanying text.

[81] To be more precise, plan terms are ordinarily set by the company unilaterally for a nonunionized workforce, but are the subject of negotiation in the case of a collectively-bargained plan.

[82] Wiedenbeck, *supra* note 43, 1044-51.

[83] Pension plans can be designed to promote different personnel policies according to the needs of the business. Some employers may wish to provide an incentive to increase job tenure, thereby reducing recruitment and training costs, while other businesses (especially since the elimination of mandatory retirement) may seek humane means for limiting job tenure, using the pension plan to ease out superannuated workers. Some pension plans are geared to providing a secure source of retirement income by accumulating regular contributions in a diversified investment portfolio for periodic distribution over the employee's retirement years, while others—such as profit-sharing and stock bonus plans—can be geared to provide a productivity incentive by making contributions dependent on firm output or profits, or by investing heavily in employer securities. *See* TERESA GHILARDUCCI, LABOR'S CAPITAL: THE ECONOMICS AND POLITICS OF PRIVATE PENSIONS 15–16, 20, 140-41 (1992) (discussing flexibility as an important of pensions for employers); Nancy J. Altman, *Rethinking Retirement Income Policies: Nondiscrimination, Integration, and the Quest for Worker Security*, 42 TAX L. REV. 433, 503, 506-08 (1987) (explaining that employer flexibility and nontax advantages make private plans superior to expanding Social Security or general savings mandate); PETER J. WIEDENBECK, ERISA: PRINCIPLES OF EMPLOYEE BENEFIT LAW 377-79 (2010) [hereinafter ERISA PRINCIPLES]; DAN M. MCGILL ET AL, FUNDAMENTALS OF PRIVATE PENSIONS 147-53 (9th ed. 2010).

[84] ERISA PRINCIPLES, *supra* note 83, at 18-19.

employers are allowed to craft workforce-specific eligibility rules, benefit levels, and many other conditions and limitations. The resulting diversity of plan terms complicates employer communication, employee planning, and judicial enforcement.

Tension between employee planning and employer autonomy was baked into ERISA. Soon after passage SPD understandability was sacrificed. The understandability norm died of neglect, which can partly be laid at the feet of the Labor Department. The Department had its hands full gearing up to implement the new comprehensive pension reform law. The substantive pension content requirements (particularly vesting, funding, and the termination insurance regime) clearly constituted the main events—the primary concerns of both ERISA's proponents and regulated industry (plan sponsors). In 1976, shortly after ERISA went into effect, the Labor Department announced that it would not prospectively rule on questions of SPD understandability.[85] The Labor Department was simply not equipped to provide advance review of proposed disclosures.[86] Regulatory triage left disclosure issues to another day, and workers to their own devices.[87] In that era pension coverage was dominated by collectively-bargained defined benefit plans of large manufacturers, and the Department—whose primary constituency was organized labor—might have presumed that unions would step up to fill the gap, acting as information intermediaries by providing their members with useful distillations and translations of plan features.

Since then, the Department has rejected the request to amend its SPD regulations "to prohibit conflicts between provisions of the SPD and the plan document by requiring the use of clear terminology and definitions, prohibiting the use of disclaimers in SPDs, and providing that

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[85] ERISA Procedure 76-1, § 5.02(d) (refusing to issue advisory opinions "relating to whether a summary plan description is written in a manner calculated to be understood by the average participant), at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/filing-requests-for-erisa-aos. This limitation likely proceeds from concern about "the inherently factual nature of the problem involved" (*see id.* § 5.01), and the limited role that legal interpretation and analysis would play in such a determination.

[86] The Department has never developed the staffing or budget that would be required to provide advance expert evaluation. With approximately 721,876 private pension plans in operation in 2018, and about 61,000 private sector employer-sponsored group health plans—to say nothing of the many plans providing life insurance, disability insurance, or other welfare benefits—comprehensive advance review would be phenomenally costly. EBSA, *supra* note 62, at 1; EBSA, GROUP HEALTH PLANS REPORT: ABSTRACT OF 2018 FORM 5500 ANNUAL REPORTS 1 (2021).

[87] *Supplemental Appropriations for Fiscal Year 1976: Hearing Before the Subcomm. on the Departments of Labor, Health, Education, and Welfare and Related Agencies of the S. Comm. on Appropriations*, 94th Cong., 131, 134 (1975) (statement of William J. Kilberg, Solicitor of Labor) ("For the first few months [after ERISA's enactment] our very limited resources were mostly devoted to putting out fires—dealing with the most immediate and critical problems.").

ambiguous SPD provisions will be interpreted against the drafter."[88] Administrative inattention to workers' access to useful (i.e., understandable) information predictably spawned judicial neglect. There was no obvious correspondence between violations of the understandability standard and ERISA's limited array of civil enforcement actions. No civil penalty is directly geared to understandability defects.[89] Hence cases were not brought by the regulator or plan participants. In principle an injunction mandating issuance of a comprehensible explanation is available as a prospective remedy,[90] but the natural response to impenetrable gobbledygook is to ask someone knowledgeable for an informal translation. That person is likely to be a supervisor or staff in the benefits department. The employer controls that messaging and can substitute informal communications for a dysfunctional SPD.

Judicial enforcement of the reliability norm led to the demise of understandability. By the mid-1980s complaints that disclosures were inaccurate or incomplete were coming before the courts, and plan members were starting to win monetary recoveries based on an SPD's failure to warn of circumstances causing disqualification, ineligibility, denial or loss of benefits, or where the plan summary promised benefits that the language of the plan did not support.[91]

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[88] Amendments to Summary Plan Description Regulations, 65 Fed. Reg. 70226, 70229 (2000). The proffered explanation was that "[t]o the extent these comments concern the understandability of SPDs to plan participants and beneficiaries, the Department believes that its current general standards on style and format of SPDs in 29 CFR 2520.102-2 are appropriate and further regulatory guidance is not necessary." *Id.*

[89] A determined plan participant might send the administrator a written request for the latest updated SPD then, once the document arrives, follow up with a written demand for a "true" SPD, meaning one that's understandable. That challenge to the adequacy of the purported SPD would undoubtedly be ignored, which in theory could give rise to claim for a discretionary civil penalty of up to $110 per day for failure to timely supply a legally satisfactory SPD. *See* ERISA §§ 502(c)(1)(B), 104(b)(4), 29 U.S.C. §§ 1132(c)(1)(B), 1024(b)(4) (2018); 29 C.F.R. §2570.502c-1 (2018) (inflation adjustment). Conceivably, a union might orchestrate a concerted campaign by arranging to have multiple member-participants submit demands for understandable SPDs. Amplifying penalty exposure in that way might produce results, but otherwise it's hard to see how there is enough money at stake for the civil penalty to serve as a realistic compliance tool.

[90] ERISA § 502(a)(3), (5), 29 U.S.C. § 1132(a)(3), (5) (plan participants, beneficiaries, fiduciaries, and Secretary of Labor authorized to bring civil action for appropriate equitable relief to enforce and provision of ERISA Title I).

[91] Zittrouer v Uarco Inc. Group Ben. Plan, 582 F. Supp. 1471 (N.D. Ga. 1984) (failure to warn of convalescent care exclusion); Hillis v. Waukesha Title Co., 576 F. Supp. 1103, 1109 (E.D. Wis. 1983) (failure to warn of forfeiture for competition); McKnight v. Southern Life & Health Ins. Co., 758 F.2d 1566 (11th Cir. 1985) (participant entitled to benefit accrual under SPD's version of break-in-service rules even if the underlying plan document denied service credit; alternative holding). *McKnight* appears to be the case that brought the risk of liability for disclosure violations to the attention of a broad group of pension and benefits law practitioners. It seems to have been the first appellate holding to impose liability. Its conclusion that in cases of conflict between the plan and the SPD, the purpose of the summary required protection of an employee who reasonably relied on the summary, received coverage in the leading specialty news service. *Breaks in Service Do Not Cancel Employee's Past Service Credits*, 12 PENS. REP. (BNA) 672 (May 13, 1985). These three cases, *Zittrouer*, *Hillis*, and *McKnight*, were highlighted in an influential treatise's discussion of equitable relief for misstatements and omissions in an SPD, STEPHEN R. BRUCE, PENSION CLAIMS 391 (1988), which seems to have stimulated or at least contributed to the explosion of disclosure litigation. (The author, Stephen Bruce, represented the employees

That unexpected liability triggered the natural defensive response: plan sponsors remade their SPDs into extended full-disclosure disclaimer documents, and the SPD morphed into a liability shield. With that development ERISA's planning function was fundamentally compromised.

The liability shield SPD is distinctly unhelpful to the average plan participant as a foundation for forward-looking decision making. (Ex post, the Sanskrit SPD might sometimes offer grounds for relief.[92]) Experts have repeatedly decried this turn of events, thus far to no avail.[93]

Diagnosing the problem falls short of charting a pragmatic path to optimal disclosure. Complaints that the liability-shield SPD is uninformative fail to grapple with, and often fail to even acknowledge, the unavoidable dilemma. The function of the SPD is not simply to provide participants an easily-understood plan summary. Rather, ERISA's goal of promoting economic efficiency—facilitating workers' career and financial planning—demands that the SPD provide an *accurate* easily-understood summary. A participant cannot *correctly* evaluate competing job opportunities nor determine her need for additional savings or supplementary insurance if she cannot count on the information conveyed by the SPD. To achieve ERISA's objectives, the SPD must give participants understandable *and reliable* information about the plan. Reliability requires that the language of the SPD must in some situations legally supersede the actual terms of the formal plan document, as the federal courts came to demand.[94] Given the sponsor's incentive to tout the plan and soft-pedal its limitations, in extreme cases the courts must impose liability based on apparent benefit promises. Without such liability SPDs would devolve into purely promotional material—understandable half-truths that workers could not safely use to plan their affairs. So long as economic efficiency is a goal, reliability is a necessary condition, and hence pressure toward excessive detail is inescapable. To preserve understandability that pressure must be counterbalanced, not ignored. The difficult question is, how?

Redressing harms traceable to inaccurate or incomplete disclosures encourages sponsors to downplay intelligibility. Greater liability exposure amplifies the reaction. To gauge that

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before the Supreme Court in *CICGA Corp. v. Amara*, 563 U.S. 421, 424 (2011).) And by 1988 *Hillis* and *McKnight* were also being cited by the leading treatise on qualified retirement plans, MICHAEL J. CANAN, QUALIFIED RETIREMENT AND OTHER EMPLOYEE BENEFIT PLANS §11.2 at 382-83 (1988 ed.).

[92] *See generally infra* Part III.

[93] The Appendix provides a synopsis of important critiques.

[94] *See infra* Part III.A.

exposure, the next part of the article investigates courts' handling of claims for relief from injuries caused by defective summaries. With that background, Part IV explores prospects for reviving understandability by resetting the trade-off between understandability and reliability.

III. Reliability's Restriction

SPD understandability fell by the wayside. In contrast, the command that the summary be "sufficiently accurate and comprehensive to reasonably apprise ... participants and beneficiaries of their rights and obligations under the plan"[95] was taken seriously. This part examines the judicial elaboration of this reliability norm and shows that it is enforced with restrictions that limit access to effective relief. Plan sponsors persuaded courts that relief is available through equity, not contract law, which poses obstacles to monetary recovery and collective litigation.

Redressable SPD defects fall into three categories. First, the SPD may err by contradicting the underlying terms of the plan (the inaccurate SPD). Second, the SPD may contradict itself. Third, the mistake may lie in an SPD omission, by failing to warn plan participants and beneficiaries of important qualification criteria, for example. We begin with the inaccurate SPD, which illustrates how ERISA's limited array of causes of action and remedies has shaped disclosure case law.

A. The Inaccurate SPD

1. Law v. Equity: *CIGNA Corp. v. Amara*

ERISA grants participants and beneficiaries the right to sue for specified civil penalties, for benefits due, to redress breaches of fiduciary obligations, and for appropriate equitable relief to enforce ERISA's requirements or the terms of the plan.[96] The statutory enforcement mechanism is exclusive—ERISA preempts state law causes of action, including tort claims for fraud, deceit, or misrepresentation.[97] Therefore, workers harmed by deficient communications must fashion their claim to fit within one of ERISA's limited grounds for judicial intervention.

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[95] ERISA § 102(a), 29 U.S.C. § 1022(a) (2018).

[96] ERISA §§ 502(a)(1)-(3), 409, 29 U.S.C. §§ 1132(a)(1)-(3), 1109 (2018).

[97] ERISA § 514, 29 U.S.C. § 1144 (2018); *see* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987) (holding that ERISA preempts state common law tort and contract actions founded on an insurer's bad faith refusal to pay claims, relying on "the clear expression of congressional intent that ERISA's civil enforcement scheme be exclusive"); Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985).

If the SPD is inaccurate, workers complain that promised benefits were denied based on legal technicalities of which they were unaware. (Although any participant or beneficiary can obtain access to the underlying plan documents, governing instruments are difficult to understand and are not routinely distributed.[98]) The SPD is intended to give participants accessible and reliable information about the plan, and to serve as their primary source of information concerning the plan's terms.[99] The planning function requires accurate disclosure of the most important aspects of the benefit program, so that workers can make wise use of it. From that perspective, the SPD defines the core deal between the employer and participating employees. As such, the SPD arguably *is* the plan: the SPD's terms, as far as they go, could sensibly be understood as the terms of the contract. That argument suggests that refusal to pay benefits based on a discrepancy between the SPD and underlying formal plan documents constitutes a breach of contract that might be redressed by a suit "to recover benefits due ... under the terms of his plan [or] to enforce his rights under the terms of the plan".[100] Hence, if the SPD is understood to embody the crux of the deal, then recovery on the contract should be available in a suit for benefits, without proof of reliance.

In contrast, if an inaccurate SPD merely describes but does not itself comprise "the plan," then a suit to recover benefits will fail, for the terms of the plan as set forth in the governing documents have not been breached. Consequently, instead of enforcing the plan, recovery is limited to "appropriate equitable relief" to enforce ERISA in contravention of the plan. A claim of promissory estoppel is equitable in nature and may be brought to redress a violation of the statutory requirement that the SPD be accurate. Estoppel is conditioned on proof of reliance, but proof of reliance can be difficult and costly in the employee benefit context. Often the employee's claim—that she rejected another job offer, failed to save, or declined to purchase additional insurance because of her understanding of a plan's promised benefits—lacks objective corroboration. Conditioning recovery on convincing proof of detrimental reliance risks under-enforcement of the norm that the SPD provide accurate information. That laxity would reduce the sponsor's incentive to take precautions to ensure accuracy.

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[98] ERISA § 104(b)(2), (4), 29 U.S.C. § 1024(b)(2), (4) (2018).

[99] *E.g.*, Pettaway v. Teachers Ins. & Annuity Ass'n of Am., 644 F.3d 427, 433 (D.C. Cir. 2011) (observing that the SPD is an "ERISA-mandated, plain-language document upon which plan participants may rely to understand their benefits"); Heidgerd v. Olin Corp., 906 F.2d 903, 907 (2d Cir.1990) (noting that the SPD "will be an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary.").

[100] ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2018).

The Courts of Appeals uniformly concluded that the language of the SPD could trump contradictory plan documents, but the circuits split over whether the SPD's binding force followed from contract or estoppel.[101] In *CIGNA Corp. v. Amara*[102] the Supreme Court resolved the matter, concluding "that the summary documents, important as they are, provide communication with beneficiaries about the plan, but that their statements do not themselves constitute the *terms* of the plan for purposes of §502(a)(1)(B)", ERISA's contract-like cause of action.[103] Consequently, remedies for an inaccurate SPD must now be sought under §502(a)(3), as a claim for appropriate equitable relief to enforce ERISA's requirements.[104] That relief will often be grounded in estoppel, but the *Amara* Court indicated that in appropriate circumstances the equitable remedies of reformation or surcharge might be available.[105]

2. Reformation

In proceedings following remand in *Amara* the Second Circuit addressed the availability of reformation.[106] In connection with the transition from a traditional defined benefit pension plan to a cash balance plan, CIGNA Corporation had falsely assured participants that the new arrangement would significantly enhance their retirement program, that the initial credit to workers' new cash balance accounts would include the full actuarial value of their previously earned benefits, and that the changes would not save CIGNA money.[107] The Supreme Court had

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[101] *E.g.*, Health Cost Controls of Ill., Inc. v. Washington, 187 F.3d 703 (7th Cir. 1999) (if "the plan and the summary plan description conflict, the former governs ... unless the plan participant or beneficiary has reasonably relied on the summary plan description to his detriment"); Andersen v. Chrysler Corp., 99 F.3d 846 (7th Cir. 1996); Branch v. G. Bernd Co., 955 F.2d 1574, 1579 (11th Cir. 1992). Edwards v. State Farm Mut. Auto. Ins. Co., 851 F.2d 134, 137 (6th Cir. 1988) (reliance not required); Helwig v. Kelsey-Hayes Co., 93 F.3d 243, 249–50 (6th Cir. 1996) (*Edwards* principle that defective SPD trumps inconsistent language in plan documents applies to welfare as well as pension plans); Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found., 334 F.3d 365, 376–77, 380–82 (3d Cir. 2003).

[102] CIGNA Corp. v. Amara, 563 U.S. 421 (2011).

[103] *Id.* at 438 (emphasis in original).

[104] An inaccurate SPD is generally the product of a fiduciary breach. The plan administrator is a fiduciary tasked with furnishing an adequate SPD, and any material error therein typically proceeds from disloyalty or neglect. The resulting violation or ERISA § 404(a)(1) is not redressable under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (2018), however, because that cause of action is limited to appropriate relief under ERISA § 409, 29 U.S.C. § 1109. Section 409 renders the breaching fiduciary personally liable *to the plan*, not to the individual participant or beneficiary harmed by the breach.

[105] *Id.* at 439-42.

[106] Amara v. CIGNA Corp. (*Amara II*), 775 F.3d 510 (2d Cir. 2014).

[107] 563 U.S. at 428-30. Because the adoption, amendment, or termination of a plan is a nonfiduciary act (a so-called settlor function), CIGNA was entirely within its rights to substitute a lower-cost plan. Nevertheless, the cost misrepresentation is relevant and problematic because it reinforced the prior falsehoods (that participants' benefits would be enhanced and that their initial cash balances captured the full value of their accrued benefits), inducing workers to acquiesce in the changes.

observed that "[t]he power to reform contracts (as contrasted with the power to enforce contracts as written) is a traditional power of an equity court, not a court of law, and was used to prevent fraud."[108] Accepting that invitation, the Second Circuit found reformation justified where clear and convincing evidence established that "defendants committed fraud or similar inequitable conduct and that such fraud reasonably caused plaintiffs to be mistaken about the terms of the pension plan."[109] The record revealed that CIGNA had sought to avoid workforce dissatisfaction by misrepresenting the terms of the new cash balance plan both in SPDs and other general notices, and "actively prevented employees from learning the truth",[110] including by instructing benefits department staff and consultants *not* to provide quantitative comparisons between the old and new plans, despite employees' requests. Those factors adequately established entitlement to reformation on a class-wide basis, the appellate court concluded,[111] rendering CIGNA liable to pay the benefits as advertised.[112]

For an in-depth linguistic analysis of CIGNA's communications about its cash balance plan conversion, see JAMES F. STRATMAN, A FORENSIC LINGUISTIC APPROACH TO LEGAL DISCLOSURES: ERISA CASH BALANCE CONVERSION CASES AND THE CONTEXTUAL DYNAMICS OF DECEPTION 73-92, 175-76, 185-90 (2016).

[108] *Id.* at 440.

[109] 775 F.3d at 526.

[110] *Id.*

[111] *Id.* at 530-31; *accord* Osberg v. Foot Locker, Inc., 862 F.3d 198, 212-13 (2d Cir. 2017) (holding, on facts similar to *Amara*, that detrimental reliance need not be shown to support the remedy of plan reformation, and that proof of mistake to support class-wide reformation need not be individualized, but can be "through generalized circumstantial evidence in appropriate cases").

In *Cunningham v. Wawa, Inc.*, 387 F. Supp. 3d 529 (E.D. Pa. 2019), defendants opposed class certification of claims based upon fiduciary misrepresentations and a misleading SPD, arguing that individual evidence of detrimental reliance is required to support relief. Relying on *Osberg*, 862 F.2d at 211-12, the district court held that in light of *Amara* plaintiffs need not show detrimental reliance to seek reformation or surcharge in an action under ERISA § 502(a)(3). 387 F. Supp. 3d at 540-42, 545. Defendants were granted permission to appeal class certification, and the Secretary of Labor filed a brief supporting the district court's ruling that detrimental reliance is not necessary to support reformation or surcharge. Brief of the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees, Cunningham v. Wawa Inc., *appeal docketed*, No. 19-2930 (3d Cir. Dec. 11, 2019), 2019 WL 6837265. *See* Jacklyn Wille & Lydia Wheeler, *Wawa Retirees Get Labor Department Support in Stock Plan Battle*, BLOOMBERG BEN. & EXEC. COMP. NEWS, Dec. 12, 2019. Shortly after the Labor Department's brief was filed the parties reached a settlement in principle. Martina Barash, *Wawa, Ex-Employees Agree to Settle Stock Sell-Off Class Action*, BLOOMBERG BEN. & EXEC. COMP. NEWS, Dec. 30, 2019.

[112] The Supreme Court had refused to order benefit payments based solely on the terms of the SPD—the Court rejected the view that the SPD is the contract. Yet following remand the ultimate outcome of the litigation was an order to pay benefits in line with the SPD representations. The impact of the reformation analysis was to impose two additional preconditions on that result: (1) a showing of employer fraud or inequitable conduct, (2) causing employee mistake about the terms of the underlying plan. *Id.* at 525. The Second Circuit rejected CIGNA's argument that reformation also requires a separate showing of actual harm as a third element. Instead, the mistaken party's failure to receive the expected advantages of the agreement suffices. *Id.* at 525 n.12.

CIGNA's finely-tooled prevarication might suggest that reformation will be available to enforce SPD representations over contradictory plan terms only in extreme situations. That may be true, but a 2018 reformation case from the Sixth Circuit indicates that fraud or inequitable conduct is a flexible concept that does not always require intent to deceive.[113] The controversy concerned eligibility for subsidized early retirement ("30-and-out" benefits) under Chrysler's pension plan. The SPD said that a plan participant who had satisfied the age and service requirements for 30-and-out benefits did not need to be actively employed at retirement to qualify, but the plan document said that an employee who was terminated by the company was ineligible.[114] After the plaintiff was terminated in connection with a reduction in force his application for 30-and-out benefits was denied, despite the fact that he had recently and repeatedly been advised to consult the SPD for details about his pension.[115] Starting from the settled doctrine that contract reformation is justified where one party is mistaken and the other commits fraud or engages in inequitable conduct, the question on appeal was whether the worker needed to prove Chrysler's intent to deceive in order to demonstrate fraud or inequitable conduct. The court rejected an intentional deception requirement, remanding the case with instructions to consider certain guideposts indicative of wrongful conduct or constructive fraud.[116]

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[113] Pearce v. Chrysler Grp. LLC Pension Plan, 893 F.3d 339 (6th Cir. 2018).

[114] *Id.* at 343.

[115] *Id.* at 343-44. Pearce responded to the denial of benefits by asking the benefit manager to show him where in the SPD "he could find what you have stated" but he apparently received no response.

[116] *Id.* at 347-48. The Labor Department filed an amicus brief in *Pearce* arguing that precedent and treatises on equitable jurisdiction show that "fraud" has a broader meaning in equity than at law, and that intent to deceive is not a necessary element for reformation. Brief for the United States as Amicus Curiae in Support of the Plaintiff-Appellant, Pearce v. Chrysler Grp. LLC Pension Plan, 893 F.3d 339 (6th Cir. 2018), 2017 WL 3263553.

> In some jurisdictions it is held that there can be no estoppel unless the misrepresentations were designedly made, or were designed to deceive the same party who relied on them. The weight of authority is against both of these propositions; a party may be estopped to deny representations made when he had no knowledge of their falsity, or which he made without any intent to deceive the party now setting up the estoppel. A better statement of the principle is that the fraud consists in the inconsistent position subsequently taken, rather than in the original conduct. It is the subsequent inconsistent position, and not the original conduct that operates to the injury of the other party.

HENRY L. MCCLINTOCK, HANDBOOK ON THE LAW OF EQUITY § 31 (2d ed. 1948) (footnotes omitted). DE FUNIAK, HANDBOOK OF MODERN EQUITY 235 (2d ed. 1956) ("Fraud has a broader meaning in equity [than at law] and intention to defraud or to misrepresent is not a necessary element."); SEC v. Capital Gains Bureau, 375 U.S. 180, 193-95 (1963).

The *Pearce* court also rejected Chrysler's argument that the plan could be reformed only if the fraud or inequitable conduct occurred in drafting the plan. *Id.* at 349 (distinguishing Skinner v. Northrup Grumman Ret.

3. Estoppel

Where the disparity between the SPD and authoritative plan documents is less egregious, misinformed participants and beneficiaries will be unable to satisfy the conditions on reformation. Post-*Amara*, this situation will likely spawn a claim for equitable relief in the form of estoppel.

a. Is Reliance on an SPD Justifiable?

One of the most consequential components of estoppel, for purposes of ERISA disclosure law, is the requirement that the participant's reliance be reasonable or justifiable.[117] The function of the SPD has an important bearing on that question. Can reliance on the contents of the SPD ever be justified, in light of the Supreme Court's emphatic pronouncement that the SPD is *not* the plan, combined with the fact that ERISA grants participants and beneficiaries access to the plan documents upon demand?

The SPD was envisioned as workers' primary source of information about the terms of the plan, a ready reference serving as the foundation for career and financial planning.[118] Congress was acutely aware that plan documents are complex legal instruments that do not speak to the typical employee: to advance economic efficiency, the highlights or key provisions of

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Plan B, 673 F.3d 1162, 1166-67 (9th Cir. 2012), and emphasizing that "the basis of [Pearce's] mutual agreement with Chrysler was the SPD").

Moreover, the Second Circuit held that reformation is categorically available as a remedy, even absent proof of mistake, fraud or inequitable conduct, where it is shown that the terms of the plan violate ERISA. Laurent v. PricewaterhouseCoopers LLP, 945 F.3d 739, 749 (2d Cir. 2019).

[117] Pomeroy's treatise on equity lists six essential elements of equitable estoppel. One of them is that the party asserting estoppel must not know the true facts (for present purposes, the actual terms of the plan) at the time the false representation (here, the erroneous SPD) was made and when it was acted upon. 3 SPENCER W. SYMONS, POMEROY'S EQUITY JURISPRUDENCE § 805 (5th ed. 1941) (hereinafter POMEROY). More than simple ignorance of the true facts (good faith) is demanded, however: the party asserting estoppel must also lack a reason to know the truth.

> Since the whole doctrine is a creature of equity and governed by equitable principles, it necessarily follows that the party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted with good faith and reasonable diligence; otherwise no equity will arise in his favor.

Id. § 813, at 236. *Accord* JAMES W. EATON, HANDBOOK OF EQUITY JURISPRUDENCE 169 (1901); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1553*b*, at 785 (12th ed., Jairus W. Perry ed., 1877) ("A party setting up an equitable estoppel is himself bound to the exercise of good faith and due diligence to ascertain the truth" (footnote omitted)).

[118] *See supra* Part I. Observe that the SPD is distributed to plan participants and beneficiaries routinely and automatically—unlike operative plan instruments, no request is necessary to trigger SPD disclosure.

the program must be translated into actionable information.[119] In most instances, therefore, it would be patently *unreasonable* to expect workers to check assertions made in the SPD against the underlying plan documents. Indeed, such confirmation would be both frustrating and counterproductive: workers would be expending resources to replicate the plan administrator's vernacular communication efforts.[120] Hence workers should not be expected to look behind the SPD; absent actual awareness of an error, reliance on the mandated communication vehicle is justified per se.[121]

Virtually every SPD contains a warning, commonly called an SPD disclaimer clause, containing language asserting that, in the event that the SPD conflicts with plan document(s) or is incomplete or ambiguous, the terms of the plan document(s) control. What effect, if any, should be accorded an SPD disclaimer clause? In line with the preceding conclusion, there is longstanding and nearly unanimous agreement in the case law that the purposes of disclosure demand that the SPD have controlling legal effect in the event it conflicts with the terms of the plan, notwithstanding a disclaimer clause.[122] Turning the tables, a number of courts have

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[119] *See supra* notes 51 and 57 and accompanying text.

[120] *See* Hansen v. Cont'l Ins. Co., 940 F.2d 971, 981 (5th Cir. 1991) ("Of course, if a participant has to read and understand the [insurance] policy in order to make use of the summary, then the summary is of no use at all."); McKnight v. Southern Life and Health Ins. Co., 758 F.2d 1566, 1570 (11th Cir. 1985) (observing that it would defeat the purpose of the SPD "to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complicated document, and then proclaim that any inconsistencies will be governed by the plan.").

[121] The common law tort of fraudulent misrepresentation (deceit) offers an analogy. The Second Restatement provides that if a statute requires information to be furnished for the protection of a particular class of persons, one who makes a fraudulent representation in doing so is liable for pecuniary loss suffered by a member of the class through "justifiable reliance upon the misrepresentation in a transaction of the kind in which the statute is intended to protect them." RESTATEMENT (SECOND) OF TORTS § 536 (1977). For reliance on the misrepresentation to be justifiable the matter misrepresented must be material, but the recipient is justified in relying on the truth of the misrepresentation without investigation, even if investigation would not entail any considerable trouble or expense. *Id.* §§ 538, 540 & cmt. a.

[122] *Hansen*, 940 F.2d at 981–82. *Accord* Atwood v. Newmont Gold Co., 45 F.3d 1317, 1321 (9th Cir. 1995) (dicta); Aiken v. Policy Mgmt. Sys. Corp., 13 F.3d 138, 140–41 (4th Cir. 1993); Senkier v. Hartford Life & Accident Ins. Co., 948 F.2d 1050, 1051 (7th Cir. 1991) (dicta); Heidgerd v. Olin Corp., 906 F.2d 903, 907–08 (2d Cir. 1990); 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, 1571 (11th Cir. 1985) (alternative holding). *Contra* Kolentus v. Avco Corp., 798 F.2d 949, 958 (7th Cir. 1986); *see* De Nobel v. Vitro Corp., 885 F.2d 1180, 1195 (4th Cir. 1989) (disclaimer effective, but that conclusion subsequently treated as dictum by *Pierce v. Security Trust Life Insurance Co.*, 979 F.2d 23, 28 n.4 (4th Cir. 1992)); *cf.* Bergt v. Ret. Plan for Pilots Employed by Mark Air, Inc., 293 F.3d 1139, 1145 (9th Cir. 2002) (if SPD contradicts plan document and plan document is more favorable to employees, then plan document controls).

Early empirical research on the impression an SPD disclaimer clause left on readers found that 85% did not notice the clause and only 7% thought that it might limit or qualify other language that implied workers would receive lifetime health benefits. Stratman, *supra* note 312, at 364, 369.

invoked the SPD disclaimer clause *against the plan sponsor* in situations where plan documents proved more favorable to workers than the explanation of benefits contained in the SPD.[123]

The SPD was envisioned as only a *summary*, however. To be useful to the *average* plan participant it cannot convey all information that's potentially relevant to *any* participant. That necessarily means that some employees must sometimes be expected to inquire further. How does (should) this impact the scope of justifiable reliance on SPD content? Reliance on silence is obviously problematic, but that does not mean estoppel should apply *only* to express declarations contained in the SPD. Congress demands that the SPD "shall contain [among other information] the plan's requirements respecting eligibility for participation and benefits [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits".[124] SPD silence in the face of a duty to reveal such conditions and limitations would reasonably be understood as confirmation that the plan does not impose a restrictive criterion.[125] Accordingly, reliance on an SPD's failure to warn of a situation that could trigger disqualification, ineligibility, denial or loss of benefits is as justified as reliance on the (reasonable meaning) of the SPD's text itself.[126] Beyond that, the summary nature of the document necessarily means

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[123] *E.g.*, Glocker v. W.R. Grace & Co., 974 F.2d 540, 542 (4th Cir. 1992) ("having represented to its employees that the Plan—not the handbook—governed questions about benefits, [the employer] cannot now repudiate this representation and rely on statements in the handbook that are less favorable to [the participant].").

[124] ERISA § 102(b), 29 U.S.C. § 1022(b) (2018).

[125] To state the principle another way, participants and beneficiaries would reasonably expect that a document purporting to be an SPD satisfies ERISA's requirements for an SPD (i.e., is legally sufficient). Their reliance on the plan administrator not violating the law should be protected. The principle has long been recognized: "These [equitable] estoppels may be created by the acts of a party, by his express declaration, and in many cases by his silence,—by his not speaking when he had a duty to speak. 'If a man was silent when he ought to have spoken, he shall not speak when he ought to be silent.'" ELIAS MERWIN, THE PRINCIPLES OF EQUITY AND EQUITY PLEADING 515 (1896) (footnotes omitted) (the exact source of the quoted equitable maxim is unclear); *accord* EATON *supra* note 117, § 61 at 170 ("[M]isleading silence, where there is a duty to speak, is as effectual to create an estoppel as a direct representation"); POMEROY, *supra* note 117, at § 808a (estoppel by silence or inaction must be predicated on an obligation or duty to speak).

The principle is likewise well-established in tort law liability for nondisclosure.

> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
>
> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
>
> > (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them ... .

RESTATEMENT (SECOND) OF TORTS § 551 (1977).

[126] *See infra* Part III.C.1.

that *inferences* drawn from the SPD's text or silence may be unreliable, such that prudence would counsel additional inquiry.[127]

b. Detrimental Reliance Difficulties

Detrimental reliance is a key element of estoppel.[128] And the *Amara* Court declared that "when a court exercises its authority under §502(a)(3) to impose a remedy equivalent to estoppel, a showing of detrimental reliance must be made."[129] Estoppel's detrimental reliance element apparently calls for highly specific proof. Did the employee reject another job offer, fail to save, or decline to purchase additional insurance because of her understanding of a plan's promised benefits? As these examples suggest, reliance in the employee benefit context typically takes the form of inaction. Inaction, however, might flow from ignorance or indifference. How does a plan member prove that his complacency was SPD-based? Is independent confirmation required? Some people may discuss their circumstances and decision-making with co-workers or benefits staff, but frequently there will be no objective evidence to corroborate the worker's own (possibly sincere, possibly self-serving) assertion.

Conditioning estoppel on objective evidence of reliance—evidence that is often unavailable—will cause under-enforcement of the norm that the SPD provide accurate information.[130] Under-enforcement reduces the sponsor's incentive to take adequate precautions.[131] Insufficient care in SPD preparation undermines the planning function, decreasing the probability that the economic efficiency benefits envisioned for the SPD will be

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[127] *See infra* Part III.C.2.

[128] *See* Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 597-600 (1998) (presenting data showing that reliance continues to be a key substantive element of promissory estoppel).

[129] CIGNA Corp. v. Amara, 563 U.S. 421, 443 (2011).

[130] Economic theory suggests that a damage multiplier could be employed to counteract perverse incentives created by under-detection or under-enforcement. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 320-23, 332-33 (1991); *see also* Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369, 395–98, 401–03 (1990) (public action to reduce promisee litigation costs, as by an award of attorneys' fees, is economically superior to punitive damages as a solution to the problem of contract under-enforcement). ERISA remedies are strictly limited, however, and do not condone consequential or punitive damages or any such multiplier. ERISA § 502(a), 29 U.S.C. § 1132(a) (2018); Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) (holding ERISA preempts state law cause of action for bad faith insurance claims processing under an insured employee benefit plan).

[131] *See* Bergt v. Ret. Plan for Pilots Employed by MarkAir, Inc., 293 F.3d 1139, 1145 (9th Cir. 2002) ("[T]he law should provide as strong an incentive as possible for employers to write the SPDs so that they are consistent with the ERISA plan master documents, a relatively simple task.").

fully realized. Moreover, insisting on objective evidence of reliance would effectively prevent the award of estoppel-based relief on a consolidated or class-wide basis.[132]

Historically, estoppel developed in response to the hazards posed by voluntary one-to-one communications. Traditional estoppel amounts to a sort of equitable tort. In contrast to estoppel's paradigm case, an inaccurate SPD involves a mistake in a mandated one-to-many written communication, a communication that Congress designed to provide a foundation for planning with the expectation that it would induce reliance. Hence establishing detrimental reliance upon a faulty SPD presents a different balance of public policy considerations than are implicated by individual private communications.

c. *Proof of Causation*

This is not to say that the courts should jettison the reliance component of SPD-based estoppel claims. To do so, or to adopt an across-the-board presumption of reliance, would be tantamount to enforcing the terms of the SPD as a matter of contract. Clearly, that approach was foreclosed by *CIGNA Corp. v. Amara*.[133] Nevertheless, a presumption of reliance in some limited domains may be appropriate. In circumstances where the probability of actual reliance is high, a presumption might sensibly reconcile ERISA's policies with the typical scarcity of individualized objective evidence of reliance.

The element of reliance functions as estoppel's causation requirement. If the defective communication has not produced injury to the plaintiff, then the defendant is not responsible for the harm and should be free to disavow the miscommunication. The miscommunication need not be the sole cause of the harm, however. It is enough that the representation materially contributed to the injurious course of conduct.[134] Moreover, "a rigorous showing of causation is

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[132] The class action condition that "questions of law or fact common to class members predominate over any questions affecting only individual members," Fed. R. Civ. Proc. 23(b)(3), will be difficult to satisfy where success on the merits demands proof of how a misrepresentation impacted individual decision-making.

[133] 563 U.S. 421 (2011). *See supra* text accompanying notes 96-105.

[134] J.D. HEYDON ET AL., MEAGHER, GUMMOW AND LEHANE'S EQUITY: DOCTRINES AND REMEDIES 541 (5th ed. 2015) ("it suffices that the representation has materially contributed to the representee's course of conduct. The fact that other causes contributed to the representee's course of conduct does not prevent an estoppel from arising.").

Justifiable reliance is likewise the factual causation element of the common law tort of deceit. RESTATEMENT (SECOND) OF TORTS § 546 (1977). In that context, it is not "necessary that his reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. It is not even necessary that he would not have acted or refrained from acting as he did unless he had relied on the misrepresentation." *Id.* cmt. b. Instead, "[i]t is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision." *Id.*

not [always] required" in equity.[135] This traditional equitable flexibility suggests receptivity to a pragmatic approach to proof of causation if justice so requires.

d. "ERISA Estoppel"

Federal courts deciding ERISA cases are not ineluctably bound by the precise contours of equitable estoppel as that doctrine has traditionally been defined and circumscribed. In enacting ERISA Congress recognized that it had not resolved all the issues: implementation would reveal gaps to be filled, and new problems would arise over time. Legislators envisioned a statute supplemented by judicial development of "a body of Federal substantive law … to deal with issues involving rights and obligations under private welfare and pension plans."[136] And in some domains, like fiduciary obligations, congressional committees acknowledged that state law antecedents of the new federal regime offered inadequate protection and would require adaptation to the new environment.[137] Congress, in other words, contemplated the development as needed of a "federal common law" of employee benefit plans. As that notion pertains to the estoppel remedy for disclosure violations, the courts are empowered under section 502(a)(3) to develop "federal equity" principles to modify and adjust estoppel to better serve ERISA policies. Indeed, the federal courts have already half-consciously embarked on the endeavor. The courts of appeals have developed differing criteria for "ERISA estoppel" that depart in certain particulars from the historic chancery approach.

As currently applied in ERISA appellate cases, estoppel is a mess—variable, unstable, and confused. [138] That state of affairs seems largely attributable to two confounding factors. For starters, federal courts lack the familiarity that comes with their state counterparts' regular

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[135] Samuel L. Bray, *Fiduciary Remedies*, *in* OXFORD HANDBOOK OF FIDUCIARY LAW (E. Criddle et al. eds. 2018) ("[o]ne difference [from damages at law] is that a rigorous showing of causation is not required in equitable compensation"); HEYDON, *supra* note 134, at 817-35; *see* SEC v. Capital Gains Bureau, 375 U.S. 180, 193 (1963) (observing that "[i]t is not necessary in a suit for equitable or prophylactic relief to establish all the elements required" in a common law fraud suit, citing HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, MODERN EQUITY 643 (8th ed. 1962)); *see also* RESTATEMENT (SECOND) OF TORTS § 546 cmt. b (1977) (justifiable reliance on a fraudulent misrepresentation means that the representation must have been a substantial factor influencing the decision, but it is not "necessary that he would not have acted or refrained from acting as he did unless he had relied on the misrepresentation"). In contrast, a stricter standard of causation is generally required for negligence. *Id.* § 432(1) & cmt. a ("the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent").

[136] 120 CONG. REC. 29,942 (remarks of Sen. Javits).

[137] S. Rep. No. 93-127, at 29 (1973); H.R. Rep. No. 93-533, at 12 (1973).

[138] For a survey of standards and cases, see Dale Joseph Gilsinger, Annotation, *Showing of Reliance on or Prejudice from Summary Plan Description (SPD) by Party Seeking to Enforce Terms of SPD in Preference to Terms of Plan*, 31 A.L.R. FED. 2d 363 (2008 & Supp.).

exposure to estoppel in contract disputes.[139] More importantly, some cases fail to heed a crucial difference in context: as will be shown, ERISA policies counsel a restrictive approach to estoppel claims founded on non-SPD communications,[140] but those precedents are sometimes unthinkingly applied to defective SPD complaints.

In an early estoppel case before the First Circuit, Judge (later Justice) Breyer cited three district court cases as authority for the one-sentence announcement that to secure relief a worker allegedly misled by a faulty SPD "must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description."[141] Neither was present in the record evidence,[142] nor does the opinion acknowledge that the traditional detrimental reliance standard demands *both* reliance *and* prejudice (i.e., a change of position causing harm). Nevertheless, as an appellate case of first impression the "reliance or prejudice" formulation was picked up by some other circuits.[143]

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[139] In fairness, some circuits developed and applied a version of equitable estoppel in federal labor law disputes involving collective bargaining agreements that corresponds quite closely to traditional equity norms. Consider, for example, Apponi v. Sunshine Biscuits, Inc., 809 F.2d 1210 (6th Cir. 1987), in which the court explained:

> The elements constituting estoppel, as defined by federal common law, are: (1) conduct or language amounting to a representation of material facts; (2) the party to be estopped must be aware of the true facts; (3) the party to be estopped must intend that the representation be acted on or act such that the party asserting the estoppel has a right to believe it so intended; (4) the party asserting the estoppel must be unaware of the true facts; and (5) the party asserting the estoppel must detrimentally and justifiably rely on the representation.

Id. at 1217 (citing Acri v. International Association of Machinists*,* 781 F.2d 1393, 1398 (9th Cir.1986)). Apart from organization, that rendition of the elements of estoppel is virtually identical to Pomeroy's, *supra* note 117. The difficulty, as explained below, is that this expertise in the sphere labor contracts often was not carried over to ERISA.

[140] *See infra* Part IV.D. To bolster SPD's role as the primary source of information about plan terms, workers' should ordinarily be incentivized to consult the SPD, assuming that it is understandable, rather than blithely crediting informal communications.

[141] Govoni v. Bricklayers, Masons & Plasterers Int'l Union, Local 5 Pension Fund, 732 F.2d 250, 252 (1st Cir. 1984). *See* Gilsinger, *supra* note 138, § 5 & cmt. (noting that despite brevity and weakness of its analysis, *Govini* is frequently cited by courts both within and outside the First Circuit).

[142] *Id.*

[143] Aiken v. Policy Mgmt. Sys. Corp., 13 F.3d 138, 141 (4th Cir. 1993) (relying on *Govoni* and explicitly endorsing the disjunctive nature of the conditions); Chiles v. Ceridian Corp., 95 F.3d 1505, 1519 (10th Cir. 1996) (relying on *Aiken*); Godwin v. Sun Life Assur. Co. of Canada, 980 F.2d 323, 328 (5th Cir. 1992) *Cf.* Buce v. Allianz Life Ins. Co., 247 F.3d 1133, 1156 n.1 (11th Cir. 2001) (referring to the reliance or prejudice standard as a "somewhat cryptic requirement").

The Eighth Circuit also adheres to this standard, at least in cases involving a "faulty" SPD (one that does not contain all the information required by the statute and regulations). Palmisano v. Allina Health Systems, 190 F.3d 881, 887-88 (8th Cir. 1999). That position can likewise be traced back to *Govoni*. *See* Lee v. Union Electric Co., 789 F.2d 1303, 1308 (8th Cir. 1986) (dicta) (paraphrasing and citing *Govoni*).

Compared with detrimental reliance, the reliance-or-prejudice test would offer broader scope for application of estoppel in ERISA cases. Other circuits, however, have modified estoppel in ERISA cases by engrafting additional limitations on the doctrine's operation. Most prominent is a line of decisions restricting estoppel to situations in which the claimant can show, in addition to reasonable and detrimental reliance on a material misrepresentation, the presence of "extraordinary circumstances."[144] Extraordinary circumstances, according to the Third Circuit, "generally involve acts of bad faith on the part of the employer, attempts to actively conceal a significant change in the plan, or commission of fraud."[145] The Sixth Circuit does not insist on bad faith, but finds extraordinary circumstances if "the balance of equities strongly favors the application of estoppel."[146] The extraordinary circumstances condition was originally imposed in cases where the claimant sought to hold the administrator to representations made in non-SPD communications. In that context it may be appropriate to limit relief to egregious circumstances, in order to maintain and promote the primacy of the SPD.[147] That concern is not implicated when participants rely to their injury on a mistaken SPD.[148] Nevertheless, in the Sixth Circuit the extraordinary circumstances limitation has

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[144] *E.g.*, Mello v. Sara Lee Corp., 431 F.3d 440, 444-45 (5th Cir. 2005); Burstein v. Retirement Account Plan for Emps. of Allegheny Health Educ. & Research Found., 334 F.3d 365, 383 (3d Cir. 2003); *see also* Pisciotta v. Teledyne Indus., Inc., 91 F.3d 1326, 1331 (9th Cir. 1996); Vallone v. CAN Fin. Corp., 375 F.3d 623 (emphasizing "narrow scope" of ERISA estoppel and noting that only extreme circumstances justify such claims).

[145] Jordan v. Federal Express Corp., 116 F.3d 1005, 1011 (3d Cir.1997).

[146] Paul v. Detroit Edison Co. & Michigan Consol. Gas Co. Pension Plan, 642 F. App'x 588, 594 (6th Cir. 2016) (holding estoppel conditions satisfied where worker was given repeated written and oral assurances of the correctness of the projected amount of early retirement benefits, and would suffer substantial economic harm by reduction of pension and repayment of more than $17,000 of erroneous overpayments). Similarly, the Ninth Circuit has observed:

> Although we have not defined "extraordinary circumstances" in this context, courts have held that making "a promise that the defendant reasonably should have expected to induce action or forbearance on the plaintiff's part," Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 86 (2d Cir.2001), as well as "conduct suggesting that [the employer] sought to profit at the expense of its employees," a "showing of repeated misrepresentations over time," or evidence "that plaintiffs are particularly vulnerable," Kurz v. Phila. Elec. Co., 96 F.3d 1544, 1553 (3d Cir.1996), can constitute extraordinary circumstances.

Gabriel v. Alaska Elec. Pension Fund, 773 F.3d 945, 957 (9th Cir. 2014).

[147] *See infra* Part IV.D.

[148] The "extraordinary circumstances" condition might arguably be appropriate, as a matter of policy, in a small subset of defective SPD cases. If the alleged SPD defect involves a mistaken implication (*not* the omission of a required warning), then to avoid incentivizing ever-more-lengthy and detailed SPDs (that is, to avoid undermining the summary nature of the document), perhaps relief should generally be denied. This category of cases is discussed below as an incomplete SPD of the material omission type (Part III.C.2).

carried over into estoppel claims founded on inaccurate SPDs.[149] The Ninth Circuit seems poised to make a similar hash of estoppel as applied to an SPD that contradicts the plan.[150]

Despite doctrinal unfamiliarity and categorical confusion, some modifications of traditional equitable estoppel principles offer promising adaptations to the ERISA environment. Consider the approach of the Second Circuit. After reviewing the confusion in the appellate courts, the Second Circuit rejected a detrimental reliance requirement because it "imposes an insurmountable hardship on many plaintiffs," and "hardly advances the Congressional purpose of protecting the beneficiaries of ERISA plans by insuring that employees are fully and accurately apprised of their rights under the plan."[151] Concluding that the "consequences of an inaccurate SPD must be placed on the employer," the court opted to require a showing "that a plan participant or beneficiary was *likely* to have been harmed as a result of a deficient SPD.

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[149] Pearce v. Chrysler Group LLC Pension Plan, 893 F.3d 339, 351 (6th Cir. 2018). The plaintiff argued that additional estoppel elements, including the extraordinary circumstances requirement, should not be applied to him because they had been developed for non-SPD communications, and in an era when the Sixth Circuit held that the SPD's provisions controlled by contract if they were in conflict with the plan. *Id.* at 350. Admitting that this argument was logical, the court nevertheless found it foreclosed by circuit precedent applying those restrictive estoppel requirements in several cases decided after the Supreme Court decided *Amara*. *Id.* None of the four cited post-*Amara* Sixth Circuit cases, however, involved an inaccurate SPD. Rather than distinguishing them, the *Pearce* court apparently felt bound by the assertion in earlier opinions that the restrictive approach to estoppel applies whenever the plaintiff is attempting to invoke equitable estoppel to avoid unambiguous pension plan provisions.

[150] *See* Gabriel v. Alaska Elec. Pension Fund, 773 F.3d 943, 955-57, 958-61 (9th Cir. 2014). Like the Sixth Circuit, the Ninth Circuit developed additional restrictions on estoppel claims based upon non-SPD communications: "to maintain a federal equitable estoppel claim in the ERISA context, the party asserting estoppel must not only meet the traditional equitable estoppel requirements, but must also allege: (1) extraordinary circumstances; (2) 'that the provisions of the plan at issue were ambiguous such that reasonable persons could disagree as to their meaning or effect'". *Id.* at 957 (quoting Spink v. Lockheed Corp., 125 F.3d 1257, 1262 (9th Cir.1997)). Also like the Sixth Circuit, pre-*Amara* the Ninth Circuit treated an inaccurate SPD as binding under a contract theory, without regard to estoppel or reliance. Bergt v. Retirement Plan for Pilots Employed by MarkAir, Inc., 293 F.3d 1139, 1143 (9th Cir. 2002) (deciding based on the purpose of the SPD to "follow the other courts that have held that the SPD is part of the ERISA plan", but "conclud[ing] that when the plan master document is more favorable to the employee than the SPD, and unambiguously allows for eligibility of an employee, it controls, despite contrary unambiguous provisions in the SPD", *id.* at 1145). Post-*Amara*, the insistence that estoppel can never be applied when "recovery on the claim would contradict written plan provisions", *Gabriel*, 773 F.3d at 956, clearly implies that workers who reasonably rely to their detriment on an inaccurate SPD will be afforded no relief. Estoppel will be available only if the underlying unknown and undisclosed plan terms are ambiguous, and only in the face of extraordinary circumstances. In the wake of *Amara* the Ninth Circuit has not simply retreated from characterizing the SPD's terms as the core of the benefit contract, it has stripped the SPD of any special legal significance: for estoppel purposes, it's just another written communication that participants and beneficiaries should treat as suspect and unreliable.

[151] Burke v. Kodak Ret. Income Plan, 336 F.3d 103, 112 (2d Cir. 2003) (quoting Estate of Ritzer v. Nat'l Org. of Indus. Trade Unions Ins. Trust Fund Hosp., Med., Surgical Health Benefit, 822 F. Supp. 951, 955-56 (E.D.N.Y.1993)). The *Burke* court expressly declined to use "harsh common law principles to defeat employees' claims based on a federal law designed for their protection," 336 F.3d at 113-14. *See* Frommert v. Conkright, 433 F.3d 254, 267 (2d Cir. 2006) (applying likely harm standard as predicate for relief under ERISA § 204(h), 29 U.S.C. § 1054(h) (2018), in cases of failure to provide adequate advance notice of a significant reduction in the rate of future benefit accrual).

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."[152]

It was a challenge to the validity of this "likely harm" standard that led the Supreme Court to grant certiorari in *CIGNA Corp. v. Amara*.[153] During oral argument Justice Breyer suggested that the sensible way to proceed in a class action seeking redress under ERISA section 502(a)(3) for injuries allegedly due to misinformation would be to require the defendant to respond to plaintiffs' preliminary showing of likely harm by presenting evidence that particular class members were not injured by the faulty communication. Indeed, he speculated that the outcome of that burden-shifting approach would not differ much from enforcing the SPD as a contract under section 502(a)(1).[154] Defendant's counsel insisted that the equitable remedy for such misinformation lay in estoppel, and that relief requires plaintiff to present individualized proof of detrimental reliance.[155]

The Court's *Amara* opinion, written by Justice Breyer, held that the SPD does not set forth the terms of the plan, then pivoted to disavow the notion that individual proof of detrimental reliance is a necessary condition for a monetary recovery in an action for appropriate equitable relief. The opinion explains that "any requirement of harm must come from the law of equity" and the requisite standard turns upon the equitable remedy sought.[156] Equity did not "insist upon a showing of detrimental reliance in cases where the chancellor ordered 'surcharge.'"[157] To obtain relief by surcharge for a defective SPD, said the Court, a participant or beneficiary "need only show harm and causation." Hence, for surcharge at least, the court seemed to endorse the likely harm test.

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[152] 336 F.3d at 113 (emphasis in original). *See* Weinreb v. Hosp. for Joint Diseases Orthopaedic Inst., 404 F.3d 167, 171–72 (2d Cir. 2005) (following *Burke*, but finding presumption rebutted by actual knowledge of plan requirement).

[153] 563 U.S. 421, 425 (2011) ("We agreed to decide whether the District Court applied the correct legal standard, namely, a 'likely harm' standard, in determining that CIGNA's notice violations caused its employees sufficient injury to warrant legal relief.").

[154] Transcript of Oral Argument at 15-17, 23-24, CIGNA Corp. v. Amara, 563 U.S. 421 (2011) (No. 09-804).

[155] *Id.* at 17, 18, 24, 54-55. In addition, defendants' counsel suggested a very restrictive view of the evidence that would be sufficient to demonstrate detrimental reliance: proof that a participant who had decided to leave the company reacted to faulty information by continuing employment. *Id.* at 24. The Chief Justice responded skeptically to the assertion that each plan member must individually show injury and causation. *Id.* at 20.

[156] *Id.* at 443.

[157] *Id.* at 444.

> [T]he standard of prejudice must be borrowed from equitable principles, as modified by the obligations and injuries identified by ERISA itself. Information-related circumstances, violations, and injuries are potentially too various in nature to insist that harm must always meet that more vigorous "detrimental harm" [sic, reliance] standard when equity imposed no such strict requirement.[158]

The *Amara* majority's openness to modification of equitable principles to adapt them to ERISA disclosure violations seems to endorse development of "federal equity" principles.[159] Yet the flexibility exhibited with respect to the surcharge remedy stands in marked contrast to Justice Breyer's unqualified pronouncement, writing for a six member Court majority, that a showing of detrimental reliance is needed to impose a remedy equivalent to estoppel.[160] Perhaps equity's historic flexibility, and ERISA's policy imperatives, lose their force when the remedy invoked is estoppel. Or perhaps the opinion's focus on alternative equitable remedies supporting monetary relief led to uncritical contrasts with the black letter rules of estoppel.

If estoppel is imposed only on behalf of those few individual participants or beneficiaries able to present objective evidence that they altered their course of conduct, then some SPD inaccuracies will impose widespread pernicious effects. Many errors in the summary, however, threaten only a few workers in unusual circumstances. If the prospective importance (salience) of the plan feature to that group of workers is low, then claims of detrimental reliance that lack objective corroboration carry a strong whiff of post-hoc opportunism. Federal courts could develop principles of "ERISA estoppel" to mediate between these two poles: insisting on objective corroboration where the likelihood that the mistaken communication would influence decision-making seems low, while dispensing with that requirement where the error pertains to a matter that's widely seen as an important plan feature. In the latter case, where circumstances indicate a high probability that the error is material to a substantial segment of the workforce, that probability could be accepted as a substitute for individualized proof of causation. In effect, likely harm—or rather likely detrimental reliance—would support award of estoppel-based relief on a consolidated or class-wide basis.[161]

Legal scholarship on equitable remedies, and estoppel in particular, demonstrates that such an adaptation of estoppel's requirements to the employee benefit plan context would be

[158] *Id.* at 445.

[159] *See supra* text accompanying notes 136-137.

[160] 563 U.S. at 443.

[161] *See supra* note 132 and accompanying text.

entirely consistent with the traditions of the field. History "shows that equity's established emphasis on the public interest and judicial discretion intersect in refining the application of these doctrines" including estoppel.[162] Equitable principles are expanded or contracted in service of the public interest, and the Supreme Court has equated the public interest with the purposes or objectives of governing legislation.[163] Courts have adjusted estoppel's reliance element when needed to promote fair play and protect weaker parties.[164] In some circumstances courts have dispensed with the reliance requirement entirely, adopting a doctrine of "quasi-estoppel."[165]

The Supreme Court has not squarely addressed the meaning of detrimental reliance in ERISA disclosure cases. Equity's longstanding history of evolution and adaptation indicates that when faced with the task the Court, vested with jurisdiction over "all Cases, in Law and Equity, arising under ... the Laws of the United States,"[166] has authority to modify or eliminate the reliance requirement according to its reading of ERISA's policy. But ERISA serves multiple competing policies. The disclosure regime sought to advance worker career and financial planning, deter abuses, and arm participants with the information necessary to enforce their rights.[167] Yet Congress also sought to promote sponsorship by controlling plan administration costs and reserving a sphere of employer autonomy.[168] Emphasis on the planning function would seem to counsel relaxation of estoppel's reliance element, while a primary regard for the employer's freedom of action might lead to insistence on objective proof of individualized reliance. The philosophical outlook of the Justices and the facts of the case (e.g., indicators of deliberate deception by the administrator or opportunistic behavior by the participant) could affect the stringency of the reliance component of ERISA estoppel.

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[162] T. Leigh Anenson, *Equitable Defenses in the Age of Statutes*, 36 REV. LITIG. 659, 664 (2018).

[163] *Id.* at 672-78.

[164] T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 389-98 (2008).

[165] *Id.* at 394-98; T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633, 640 n.45, 650-51 (2007). *See* POMEROY, *supra* note 117, at §§ 816, 818 (discussing acquiescence as grounds for quasi-estoppel).

[166] U.S. Const. art. III, § 2.

[167] *See supra* Part I.A.

[168] Cost containment has been a prominent refrain in the Court's recent ERISA opinions. *See* Wiedenbeck, *supra* note 43, at 1056-59.

Dispensing with objective evidence of individual reliance in circumstances where faulty disclosure exposes workers to widespread risk of harm would prioritize ERISA's goal of improved career and financial planning. Such an adaptation of traditional estoppel conditions would tell the plan administrator, "In crafting the SPD, emphasize what's truly important." If the employer can foresee that an issue has substantial value to a broad segment of the workforce, then the planning function should insist that the administrator either get it right or stand behind its assurance. In contrast, if the importance of an issue is small or cannot reasonably be anticipated, then a foot fault in SPD drafting would not trigger liability absent persuasive evidence of justifiable detrimental reliance.[169] That latitude would reduce costs, alleviate pressure to turn the SPD into an uninformative incomprehensible liability shield, and promote plan sponsorship.[170]

B. The Self-Contradictory SPD

1. Perceptible Conflicts

If, instead of contradicting the underlying plan documents, the SPD contradicts itself, courts generally refuse to impose liability, on the view that reliance is unjustified. If a reasonable participant's careful reading of the SPD alone reveals an inconsistency, further investigation would seem to be the prudent response. Faced with an obviously defective SPD, common sense would counsel participants to take additional steps to inform themselves, such as by calling the contradiction to the attention of the plan administrator or consulting the terms of the underlying plan documents. Failure to do so would defeat an estoppel claim, for want of reasonable reliance. Taking the initiative to investigate, in contrast, advances the collaboration function by tending to rapidly identify and correct communication gaffes.[171]

Such self-help is feasible only in instances where the SPD contradiction is readily apparent to the workers. Apparent internal conflicts cry out for correction or further explanation. Many SPD discrepancies are imperceptible ex ante to the average plan participant,

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[169] By way of comparison, if the SPD governed by contract, then the employer would be bound by the terms of the SPD without proof of actual or likely reliance. The SPD would be enforced even in situations where it could have no meaningful influence on the worker's career or financial planning. Another revealing comparison is to the common law tort of deceit, which imposes liability only if the loss falls within the foreseeable risk of harm created by the misrepresentation (a "legal causation" requirement). RESTATEMENT (SECOND) OF TORTS § 548A (1977).

[170] *See supra* Part I.C.; ERISA PRINCIPLES, *supra* note 83, at 18-19.

[171] *See supra* Part I.A.

however. ERISA policies counsel greater receptivity to estoppel claims founded upon apparent promises belied by imperceptible (or latent) internal conflicts.

The self-contradictory SPD problem received a great deal of attention during the 1990s and early 2000s in a series of cases involving SPDs that apparently promised no-cost, life-long retiree health care, but also reserved to the employer the unrestricted right to amend or terminate the plan.[172] The litigation challenging General Motors' cost-shifting modifications to its retiree health plan for salaried employees was of this type.[173] ERISA does not require vesting of welfare benefits,[174] and retiree health care is classified as a welfare benefit, even though the plan provides valuable long-term deferred compensation. The employer is free, however, to make a vesting commitment.[175] The employer may, as a matter of contract, unconditionally obligate itself to provide future welfare benefits, or it can extend such benefits subject to any conditions or limitations it chooses.[176] Employers providing retiree health care plans typically condition eligibility for benefits on retirement at specified ages, and may require completion of an extended period of service. In addition, the plan documents invariably reserve the right to amend or terminate the plan, for ERISA requires every employee benefit plan to contain a procedure for amending the plan.[177] Read broadly, such a "reservation of rights" clause imposes a crucial additional condition on eligibility for benefits: the plan sponsor must not alter or

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[172] *E.g.*, Vallone v. CNA Fin. Corp., 375 F.3d 623 (7th Cir. 2004); Sprague v. Gen. Motors Corp., 133 F.3d 388, 403 (6th Cir. 1998) (*Sprague V*) (en banc); Chiles v. Ceridian Corp., 95 F.3d 1505 (10th Cir. 1996); *In re* Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 58 F.3d 896 (3d Cir. 1995); Jensen v. SIPCO, Inc., 38 F.3d 945 (8th Cir. 1994). *See also* Calogera Abbruscato v. Empire Blue Cross & Blue Shield, 274 F.3d 90 (2d Cir. 2001) (life insurance benefits).

[173] *See supra* text accompanying notes 1-25.

[174] ERISA §§ 201(1), 203(a) 29 U.S.C. §§ 1051(1), 1053(a) (2018).

[175] *E.g.*, Kelly v. Honeywell Int'l, Inc., 933 F.3d 173 (2d Cir. 2019) (retiree medical benefits vested by contract); Jensen v. SIPCO, Inc., 38 F.3d at 951–52 (same); Alexander v. Primerica Holdings, Inc., 967 F.2d 90, 95 (3d Cir. 1992); *In re* White Farm Equip. Co., 788 F.2d 1186, 1193 (6th Cir. 1986) ("The parties may themselves set out by agreement or by private design, as set out in plan documents, whether retiree welfare benefits vest, or whether they may be terminated.").

In M & G Polymers USA, LLC v. Tackett, 135 S. Ct. 926 (2015), the Supreme Court held that the decision whether a collective bargaining agreement establishing a retiree health care plan includes a commitment to vesting benefits must be made "according to ordinary principles of contract law," *id.* at 933. A prominent scholar concluded that the suggested interpretive approach is actually quite misguided from a contract law perspective. Robert A. Hillman, *The Supreme Court's Application of "Ordinary Contract Principles" to the Issue of the Duration of Retiree Healthcare Benefits: Perpetuating the Interpretation/Gap-Filling Quagmire*, 32 A.B.A. J. LAB. & EMP. L. 299 (2017). The *Tackett* majority's approach could be understood as imposing a clear statement rule to support the vesting of welfare benefits—in effect, a presumption against vesting. *See* Wiedenbeck, *supra* note 43, at 1058-63.

[176] The highly conditional—and typically evanescent—character of promised welfare benefits is explained in Wiedenbeck, *supra* note 43, at 1044-51.

[177] ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3) (2018).

disavow its commitment before the health care is sought. The real issue in the retiree health plan cutback cases is how broadly *should* such a reservation of rights clause be read?

The matter is noncontroversial if the SPD clearly warns that the employer is obligated to provide retiree health care for the time being only, and although the employer expects to continue the program, it may be altered or discontinued at any time for any reason. Plan sponsors are seldom so forthright, however, for they have an interest in obtaining the maximum advantage from benefit programs, which requires that workers place a high value on them. To obtain that advantage (typically reduced worker turnover or lower current compensation), employers want to tout the benefits of the program, and lifetime, no-cost health care coverage is a considerable benefit.

2. Imperceptible Conflicts: ERISA and the Big Lie

This is all well and good, for benefit plans are voluntary programs that must serve the employer's interest as well as the interests of the participants and beneficiaries.[178] But if the touting appears in the SPD itself, there is cause for concern. And if the glowing description crosses the line to puffing or deliberate deception—as where the SPD makes strong representations as to the future continuance of the program (explicit promises of lifetime medical care, for instance), with the only hint that benefits could be reduced or employee costs increased appearing as an inconspicuous statement concerning amendment authority located in a remote part of the document—then that concern should turn to alarm.[179]

Two circuits have squarely held that a reservation-of-rights clause in the SPD insulates the plan sponsor from liability for lifetime benefits promised elsewhere in the SPD. *In re Unisys Corporation Retiree Medical Benefit "ERISA" Litigation*[180] involved an SPD that stated, "When you retire ... the comprehensive medical expense benefits then in force for you and your eligible dependents under this plan will be continued for the rest of your life," with a reservation-of-

[178] For a discussion of ERISA's policy of preserving employer autonomy, see ERISA PRINCIPLES *supra* note 83, at 18-19; Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105 (1988); Wiedenbeck, *supra* note 43, at 1018-21.

[179] *See* Stratman, *supra* note 312 (finding 85% of the subjects in an experiment on SPD comprehension did not even notice an SPD disclaimer clause printed in a smaller typeface near the end of the document). The problem with which we are here concerned arises only when the SPD is internally inconsistent, and its resolution depends upon the special status of the plan summary. Where the promise of continued benefits does not appear in the SPD, but is made through other oral or written communications, participants may be similarly misled, but the problem should be analyzed in terms of the binding effect of informal communications. *See infra* Part IV.D.

[180] 58 F.3d 896 (3d Cir. 1995).

rights clause in another location. The Third Circuit dismissed the retirees' estoppel claim "because it cannot be reconciled with the unqualified reservation of rights clauses in the plan."[181] Estoppel generally requires reasonable or justifiable reliance, and it's foolish to credit either of two contradictory statements. The Sixth Circuit, which at the time enforced the SPD as a matter of contract, also refused relief, holding that an unambiguous reservation-of-rights clause implicitly qualifies representations that the program will be maintained as-is in the future.[182] Under either approach, the message is, let the participant beware.[183]

Other courts have criticized these decisions in dicta.[184] The Eighth Circuit, for example, held that an internal SPD conflict between a promise of benefit continuation and reserved amendment rights makes the benefit contract ambiguous, allowing resort to extrinsic evidence to resolve the confusion, and preventing summary judgment for the employer.[185]

Should notice of retained amendment authority negate an SPD's apparent promise of lifetime benefits? Three important considerations suggest that it should not.

First, the contradiction in the SPD, however apparent to judges and lawyers, is seldom obvious to—and never highlighted for—participants. It's not as if one paragraph of the summary flatly announces "*X*" while the following paragraph declares "*not X*". Instead, the

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[181] *Id.* at 907 (3d Cir. 1995). *Unisys*, which is founded on estoppel principles, predates *Burstein v. Retirement Account Plan for Employees of Allegheny Health Education & Research Foundation*, 334 F.3d 365 (3d Cir. 2003), in which the Third Circuit repudiated estoppel in the inaccurate SPD context. In the aftermath of *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), holding that the SPD is not the plan and does not govern as a matter of contract, the *Unisys* estoppel approach is presumably reinstated.

[182] Sprague v. Gen. Motors Corp., 133 F.3d at 400–01.The long and convoluted history of the *Sprague* litigation is briefly summarized in this article's introduction, see *supra* text accompanying notes 1-24.

[183] Several other decisions are routinely cited for the proposition that a "reservation-of-rights" clause overrides a promise of lifetime benefits. In those cases, however, the vesting language appeared in informal communications, not in the SPD. Hughes v. 3M Retiree Med. Plan, 281 F.3d 786 (8th Cir. 2002); Gable v. Sweetheart Cup Co., 35 F.3d 851 (4th Cir. 1994); Alday v. Container Corp. of Am., 906 F.2d 660 (11th Cir. 1990).

[184] Diehl v. Twin Disc, Inc., 102 F.3d 301, 307 (7th Cir. 1996) (calling *Unisys* a "forced construction" and "interpretive gymnastics"); Stearns v. NCR Corp., 97 F. Supp. 2d 954, 963 (D. Minn. 2000) ("[T]he *Sprague* decision in effect gives [employers] carte blanche license to offer inducements to employees to waive their rights and then to renege on their promises after the employees have irrevocably done so. Nothing in ERISA requires courts to sanction such an unfair result."), *rev'd*, 297 F.3d 706, 712 (8th Cir. 2002) (holding that "there must be an affirmative indication of vesting in the plan documents to overcome an unambiguous reservation of rights").

[185] Barker v. Ceridian Corp., 122 F.3d 628, 638 (8th Cir. 1997). *See also* Am. Fed'n of Grain Millers v. Int'l Multifoods Corp., 116 F.3d 976, 981 (2d Cir. 1997) ("In this Circuit, to reach a trier of fact, an employee does not have to 'point to unambiguous language to support [a] claim. It is enough [to] point to written language capable of reasonably being interpreted as creating a promise on the part of [the employer] to vest [the recipient's] ... benefits.'").

summary typically emphasizes an apparently unequivocal benefit promise, while another section of the document—typically at the end, and often grippingly labeled "Regulatory Notices" or "General Provisions"—includes a boilerplate incantation of the sponsor's retained right to modify or terminate. Hence the inconsistency between representations concerning the value of the plan in the future and a reserved power to pull the plug has very low salience and may be imperceptible to the average plan participant.[186] Indeed, it may be practically invisible to any non-lawyer reader, especially if the SPD is accompanied by other employer representations touting generous plan benefits.

Second, focusing on the conscientiousness (or skepticism) of the participant overlooks ERISA's policies. An SPD containing such a hidden ambiguity is defective: it fails to "reasonably apprise [] participants and beneficiaries of their rights and obligations under the plan."[187] It seems odd to say that participants must bear an additional burden (the costs of investigation or the risks of failing to investigate) because the administrator has violated ERISA. Instead of forcing participants to look behind the SPD when faced with inconsistent terms, they could be permitted to rely on a reasonable interpretation of the document. A reservation-of-rights clause can be read, as some courts do, to qualify representations that the program will be maintained as-is in the future; alternatively, the lifetime benefit representations can be understood as creating exceptions to the sponsor's retained amendment authority (reservation of rights).[188]

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[186] The leading understandability case, *King v. Blue Cross and Blue Shield of Illinois*, discussed *supra* text accompanying notes 247-254, entailed failure to effectually warn, but *King* can alternatively be understood to involve a contradiction imperceptible to the participant. Unlike *Sprague* and the lifetime healthcare cases, the contradiction in *King* was not deliberate.

[187] ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1) (2018). An SPD which apparently promises ongoing benefits must do more than include a boilerplate recitation of retained amendment authority: "Any description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant." 29 C.F.R. § 2520.102-2(b) (1977). If the sponsor retains unconditional authority to terminate a welfare plan but the SPD makes representations concerning future benefits, it must clearly disabuse workers of the notion that they have legally enforceable rights to continued coverage or benefits. *See* 29 C.F.R. § 2520.102-3(*l*) (2018) (both pension and welfare plan SPDs must contain "a statement clearly identifying circumstances which may result in ... loss, forfeiture ... of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the [SPD's] description of benefits"). For a discussion of failure to warn liability, see *infra* Part III.C.1.

[188] This argument was made explicit in *Unisys*: "According to the retirees, the plans were ambiguous because they were susceptible to either of two interpretations: the retirees' interpretation that the lifetime language limited the scope of the reservations of rights, or the company's interpretation that the reservation of rights limited the lifetime language." *Unisys*, 58 F.3d at 903. The opinion concludes, without explanation, that where a reservation-of-rights clause is "broad and unequivocal, it will prevail over a promise of lifetime benefits." *Id.* at 904 n.11. That proposition is at odds with the principle of contract interpretation declaring that "[w]here there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions." RESTATEMENT OF CONTRACTS § 236(c) (1932); *see* RESTATEMENT (SECOND) OF CONTRACTS § 203(c) & cmt. e (1981).

Where the covert conflict in the SPD appears in the context of an employer campaign promoting the promise of lifetime benefits, the latter accommodation seems far the more natural reading.

Finally, consider the employer's conduct and its consequences. Avoiding a self-contradictory SPD is straightforward task—it requires only a careful review of the summary description by a well-informed plan official or experienced professional. The minimal cost of prevention raises a strong inference that any such latent repugnancy is the product of a deliberate effort to mislead. Where the SPD contradicts plan documents, employers are not allowed to expressly disclaim inadvertent misstatements;[189] reading a reservation-of-rights clause broadly permits employers to implicitly disavow deceit and profit by inducing workers to overvalue benefit plans. Workers presented with an equivocal SPD may use it or ignore it, but either way society bears the cost of suboptimal career and financial planning. Alternatively, workers may investigate further, which is duplicative and wasteful.[190]

When viewed in this light, an SPD that promises lifetime benefits but also contains an unqualified reservation of amendment authority is at best an attractive nuisance, if not a guileful snare. Attention to the origin of the contradiction, its lack of salience to the average plan participant, and the relative costs that the employer and workers would have to incur to avoid harm, shows that ERISA's policies call for a remedy when the sponsor reneges on the commitment to future benefits. Does ERISA condone such a big lie? Or do "equitable principles, as modified by the obligations and injuries identified by ERISA itself" authorize relief?[191]

The *Amara* majority opinion pretty clearly telegraphs an affirmative answer: equitable relief should be forthcoming in cases involving latent SPD contradictions, and without individualized proof of detrimental reliance. That's because the conditions for plan reformation would be satisfied. Contract reformation, as observed earlier, is authorized where one party is mistaken about the terms of the undertaking and the other commits fraud or inequitable

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A distinction might plausibly be drawn between a reservation-of-rights clause that contains explicit overriding language (like "notwithstanding anything in this document to the contrary") and one that does not, because such overriding language may eliminate the contradiction. But here again the role of the SPD indicates that the presence of an ambiguity should be determined from the viewpoint of a reasonable participant, not a businessperson, lawyer, or judge.

[189] *See supra* note 122 and accompanying text.

[190] *See* EASTERBROOK & FISCHEL, *supra* note 130, at 280–81, 287 (disclosure by the firm prevents redundant production of information), 290–92 (free-rider and standardization problems support mandatory disclosure).

[191] CIGNA Corp. v. Amara, 563 U.S. 421, 445 (2011).

conduct.[192] That aptly describes the situation in which an SPD promises future health or welfare benefits but inconspicuously negates that commitment by inclusion of a reservation-of-rights clause. The contradiction, being undetectable by the average plan participant, causes mistaken belief in future entitlement, and even if the plan administrator did not craft a deliberately misleading SPD (fraudulent concealment), the administrator breached his fiduciary duty to warn (negligent concealment, or "constructive fraud").[193] Reformation could be ordered in equity, the *Amara* Court noted, even in circumstances where the complaining party (here, mistaken plan members) "was negligent in not realizing its mistake".[194]

The surcharge remedy might also be available.[195] In particular, the opinion suggested that actual harm might be adequately established for plan participants generally—even those who did not consult or even see the faulty SPD or SMM—if circumstances indicate that the terms of the summary documents were a topic of general workforce interest and discussion.[196]

In an opinion concurring in the judgment, Justice Scalia, joined by Justice Thomas, complained that the Court's entire discussion of estoppel, reformation, and surcharge was unwarranted. Moreover, "[e]ven if we adhere to our dicta" that these are distinctly equitable remedies, "it is far from clear that they are available remedies in this case."[197] Noting that CIGNA admitted that misled workers might be able to recover under an equitable estoppel

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[192] *See supra* notes 106-116 and accompanying text.

[193] 3 POMEROY, *supra* note 117, at §§ 900-902 (fraudulent concealment), 943, 955, 956 (constructive fraud by fiduciary). *See Amara*, 563 U.S. at 437 (plan administrator a "trustee-like fiduciary"), 439 (emphasizing that suit brought against plan fiduciary supports resort to equitable remedies); *see also* RESTATEMENT (SECOND) OF TORTS § 551(1) (1977), which provides liability for nondisclosure as follows:

> One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

A fiduciary relationship between the parties establishes such a duty. *Id.* § 551(2).

[194] 563 U.S. at 443 (citing 3 POMEROY, *supra* note 117, at § 856b). *See also* 3 POMEROY, *supra* note 117, at §§ 955-956b (transaction between persons in fiduciary relationship presumptively invalid absent full and fair explanation by fiduciary, and in some cases presumption can be overcome only by showing that the beneficiary acted upon independent advice). It is noteworthy that this position is also reflected in the elements of the common law tort of deceit. The recipient of a fraudulent misrepresentation can recover for pecuniary loss if he justifiably relies on the falsehood, but he "is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." RESTATEMENT (SECOND) OF TORTS §§ 537, 540 (1977).

[195] 563 U.S. at 444.

[196] *Id. See supra* notes 52-54 and accompanying text.

[197] *Id.* at 449 (Scalia, J., concurring in the judgment).

theory, Justice Scalia observed that "it presumably makes this concession only because questions of reliance would be individualized and potentially inappropriate for class-action treatment. Surcharge (which CIGNA does not concede and which is not briefed) may encounter the same problem."[198] The differing views of Justices Breyer and Scalia on the susceptibility of the surcharge remedy to class-based resolution led the lower courts on remand to avoid the uncertainty by adopting reformation as the relief mechanism.[199]

Despite the uncertain status of class-wide relief via surcharge, can one infer that some form of class-wide monetary remedy (e.g., via reformation) will be available in cases involving latent SPD contradictions? Six justices joined the Court's opinion outlining equitable remedies that might support monetary recovery on the facts of *Amara*, including Chief Justice Roberts and Justices Kennedy and Alito. That remedial discussion seems designed to send a message that the Court stood ready to disavow the notion that *Mertens v. Hewitt Associates* excludes all monetary awards from the category of equitable relief.[200] Monetary relief is one thing, but an increasingly pro-business conservative majority may not be ready to stomach a proliferation of class actions seeking large pecuniary awards against major corporate employers based on

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198 *Id.* at 450. Strategically, CIGNA Corp. sought to have the workers' defective SPD complaint treated as a claim for equitable relief for two reasons. First, the company would then invoke the ruling in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), that damages are unavailable under ERISA § 502(a)(3). Second, as Justice Scalia observed, if estoppel authorizes monetary recovery, requiring individualized proof of detrimental reliance was expected to defeat class action status and practically prevent most workers from recovering. *See* Transcript of Oral Argument at 20-24, 53, 54, CIGNA Corp. v. Amara 563 U.S. 421 (2011) (No. 09-804).

199 Amara v. CIGNA Corp., 925 F. Supp. 2d 242, 263-64 (D. Conn. 2012), *aff'd* 775 F.3d 510, 518 (2d Cir. 2014). The district court distinguished surcharge as "make-whole relief" from surcharge to prevent unjust enrichment. 925 F. Supp. 2d at 255-61. Applying traditional equity terminology, the distinction is between equitable compensation and accounting for profits. *Bray*, *supra* note135, at 6-10, 13-18. Equitable compensation is loss-based (make-whole) relief, while accounting for profits recovers the fiduciary's gain from breach of the duty of loyalty (unjust enrichment). The *Amara* district court noted that remedying unjust enrichment (accounting for profits) in particular would call into question the propriety of class-based relief. 925 F. Supp. 2d at 264. That discussion seems to imply that surcharge in the form of loss-based equitable compensation might not present that difficulty, which would be consistent with the apparent endorsement of a class-wide surcharge remedy by Justice Breyer's opinion. *See supra* text accompanying note 196.

200 508 U.S. 248 (1993). The *Amara* Court pointedly distinguished *Mertens* as a claim against a non-fiduciary. 563 U.S. at 439 ("plaintiff [in *Mertens*] sought 'nothing other than compensatory damages' against a nonfiduciary" while *Amara* "concerns a suit by a beneficiary against a plan fiduciary"). This undermining of *Mertens* may have provoked the separate opinion of Justice Scalia, who authored the Courts' opinion in *Mertens*. *See generally* John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317 (2003).

In 2016, however, the Court distanced itself from the interpretation that *Amara* "all but overrul[es] *Mertens v. Hewitt Associates*," instead asserting that "our interpretation of 'equitable relief' in *Mertens*, *Great-West*, and *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), remains unchanged." Montanile v. Board of Trustees of the National Elevator Indus. Health Benefit Plan, 136 S. Ct. 651, 660 & n.3 (2016) (citing US Airways, Inc. v. McCutcheon, 569 U.S. 88, 94-95 (2013)).

ERISA disclosure violations. Recent limitations on class action litigation[201] suggest that a spate of collective suits filed by plaintiff firms on behalf of plan participants might induce the Court to confine or repudiate *Amara*'s discussion of conditions for equitable relief. Today, a decision denying class-based monetary relief for ERISA disclosure violations seems entirely within the realm of possibility.[202]

C. The Incomplete SPD

Claims faulting an SPD for communicating insufficient information can be framed in two ways. Some cases assert that the summary is defective because it lacks the required description of all "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits".[203] This failure-to-warn characterization invites comparisons to hidden defects and dangerous consumer products. Alternatively, the complaint may contend that participants or beneficiaries were led astray because the SPD was not "sufficiently ... comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."[204] Here the assertion is that the summary, being too abbreviated, implied that benefits would be available in circumstances not authorized by the plan. This portrayal candidly laments that the SPD is a summary—or rather, that it is too summary. By inviting review of the balance struck between utility and reliability, this framing exposes the tension inherent in the SPD formulation. Acknowledged or not, incomplete SPD claims implicate the goal of *optimal*

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[201] *See*, *e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (discussing Rule 23(a) commonality requirement); Comcast v. Behrend, 133 S. Ct. 1426 (2013) (discussing Rule 23(b)(3) predominance requirement); Chavez v. Plan Benefit Services, Inc., No. 19-50904 (5th Cir. Apr. 29, 2020); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441 (2013); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623 (2012) (discussing implications of broad validation of arbitration provisions containing class action waivers); BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS (2020).

[202] A Court majority might be composed of Justice Thomas, who joined Justice Scalia's opinion in *Amara*, Justices Gorsuch, Kavanaugh, and Barrett, who joined the Court post-*Amara*, along with the Chief Justice or Justice Alito, who joined Justice Breyer's opinion for the Court in *Amara* but whose support might be dislodged by the prospect of widespread collective litigation seeking enormous sums. Such switches are not unprecedented in ERISA cases, as exemplified by the Court's rapid reversal of its initial sensitivity to allegations that a conflict of interest infected decisions by an ERISA fiduciary. *See* Wiedenbeck, *supra* note 43, at 1074-85 (contrasting Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105 (2008) with Conkright v. Frommert, 569 U.S. 105 (2010)).

[203] ERISA § 102(b), 29 U.S.C. § 1022(b) (2018); *see* 29 C.F.R. § 2520.102-3(*l*) (SPD must "clearly identify[]" such disqualifying circumstances) (2018); *id.* -3(m) (required warning of limits of PBGC guarantee of pension plan benefits).

[204] ERISA § 102(a), 29 U.S.C. § 1022(a) (2018); *see* 29 C.F.R. § 2520.102-2(a), (b) (2018).

disclosure.[205] If not handled sensitively, this category of disclosure litigation threatens to hamper career and financial planning rather than improve it.

The planning function demands trade-offs between completeness and usability. Abridgement and simplified expression make information accessible, but often create the impression that general explanations and illustrations are not subject to qualification or exceptions in special circumstances. In contrast, excessive detail inhibits utilization and obscures the principal features, conditions, and limitations of the benefit plan. Congress meant the SPD to get this central trade-off right.[206]

SPD omissions run the gamut. Some foreseeably impose widespread and acute injury, and these failure-to-warn cases, like personal injuries from defective products, demand redress. In other instances a plaintiff in special circumstances might suffer avoidable harm for want of information, but the rest of the SPD audience—typical participants and beneficiaries—could be dissuaded by length and complexity from using an expanded document. The palpably injured plaintiff presents a sympathetic claim, while the average worker's interest in getting a useable synopsis goes unrepresented before the court. In such cases the temptation to impose liability—the impetus to conclude that the SPD should have said more—should be resisted. At this end of the spectrum allowances must be made for the summary function of the SPD: to preserve utility many omissions should be treated as necessary or acceptable. These two categories, we shall see, blend into one another. Drawing a workable line between them that serves ERISA's policies presents a challenge. Yet optimal disclosure is an attainable (or at least approachable) goal, as will become clear once the nature of the extreme cases is explored.

1. Prohibited Omissions: Failure to Warn

Failure to warn of potential hazards (circumstances that may cause disqualification, ineligibility, denial or loss of benefits), it must be emphasized, means failure to *effectually* warn. In line with ERISA's planning function, required SPD warnings must be written to be understood by average plan participants. Subtle caveats discernible by lawyers or judges are insufficient: economic efficiency demands that the intended audience be alerted to possible pitfalls.[207] This principle is illustrated by *King v. Blue Cross and Blue Shield of Illinois*,[208] in

[205] *See generally* Part I.B, *supra*.

[206] *See generally* Part I.C, *supra*.

[207] *See generally* Parts I.A, IV.B.2, *supra*.

which the SMM (summary of material modifications, an SPD amendment) issued to disclose health plan alterations made to comply with the Affordable Care Act reported the elimination of lifetime benefit caps in a way that made it appear the change applied to the company's retiree health plan in addition to the plan for active employees, to which it was limited. The Ninth Circuit concluded that the SMM violated ERISA's disclosure requirements because it "does not reasonably apprise the average plan participant that the lifetime benefit maximum continues to apply to the Retiree Plan."[209] Similarly, *Koehler v. Aetna Health, Inc.* involved a health maintenance organization (HMO) SPD that required approval for out-of-network referrals, but did not clearly demand *advance* authorization for the services at issue.[210] The Fifth Circuit found the SPD ambiguous concerning whether pre-approval was required for coverage and held that ERISA's understandability standard requires that ambiguities *in the plan summary* be resolved in favor participants and beneficiaries, even if the plan administrator is expressly given discretion to interpret *the plan*.[211] And in *Frommert v. Conkright* the Second Circuit held that an SPD which did not explain the amount of a pension offset triggered by a previous lump sum distribution failed to warn of "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," and concluded that equitable relief under ERISA § 502(a)(3) would be warranted if plaintiffs could establish the standard of harm required by the equitable remedy they seek.[212]

The failures to warn in *King*, *Koehler*, and *Frommert* resulted from inattention to clarity or simple oversight. Sometimes, failure to warn is deliberate, proceeding from a calculatedly misleading SPD.

CIGNA Corp. v. Amara[213] was essentially a failure-to-warn case. The conversion of CIGNA's traditional defined benefit pension plan to a cash-balance plan was accomplished by

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[208] 871 F.3d 730 (9th Cir. 2017). *King* is discussed *infra* notes 247-254 and accompanying text.

[209] 871 F.3d at 740. *Accord* Meguerditchian v. Aetna Life Ins. Co., 999 F. Supp. 2d 1180, 1188 (C.D. Cal. 2014), *aff'd*, 648 F. App'x 605 (9th Cir. 2016) (holding short-term disability plan SPD not understandable where 60-day period for filing notice of disability was defined in terms of absence from work, but employer maintained mandatory 90-day temporary part-time return to work program); Veilleux v. Atochem N. Am., Inc., 929 F.2d 74, 76 (2d Cir. 1991) (holding SPD of severance pay plan inadequate where explanation that employees transferred to new employer upon sale of their division were not eligible for benefits appeared under the heading "Leaves of Absence" and within the "Maternity" subsection).

[210] 683 F.3d 182 (5th Cir. 2012).

[211] *Id.* at 187-89 (citing Rhorer v. Raytheon Eng'rs & Constructors, Inc., 181 F.3d 634, 642 (5th Cir. 1999)).

[212] 738 F.3d 522, 532-34 (2d Cir. 2013) (alternative holding).

[213] 563 U.S. 421 (2011).

freezing each active participant's accrued benefit under the traditional pension plan and instituting a notional account, with an initial balance determined by reference to the actuarial present value of the worker's accrued pension benefit, to which compensation and interest credits would be added each year following conversion. Upon separation from service the plan provided that the outgoing employee would receive the more valuable of her accrued benefit under the frozen pension plan and the amount indicated by her cash balance account. CIGNA failed to reveal, however, that the manner in which the initial balance to workers' notional accounts was determined would in many cases cause the frozen accrued benefit under the traditional pension plan to exceed the cash balance account for several years after the switch, despite the fact that compensation and interest credits were being added to the notional account each year. The transition rules caused many participants who continued to work for the company to derive no increase in their accumulated retirement savings despite performing several additional years of service after the new plan was instituted. (In effect, a catch up period was required before the cash balance account would actually exceed the value of the frozen pension.)[214] This undisclosed suspension of benefit accrual—a period of disqualification or ineligibility for earning additional retirement benefits—sidestepped controversy and workforce dissatisfaction. CIGNA, unlike some employers converting traditional pension plans to cash balance programs, "avoided any significant negative reaction from employees."[215] Of course that's because employees were left entirely unaware. Workers did not know that if they took a job with comparable pay at another company, and if their new employer provided retirement plan coverage, then they would actually obtain increased compensation, because in substance CIGNA had temporarily—and covertly—barred them from active participation.

The distinction between deliberate and inadvertent failures to warn—between breaches of the plan administrator's fiduciary duties of loyalty and care, respectively—could be relevant in determining the availability of relief. As explained earlier, plan reformation may constitute appropriate equitable relief in circumstances where fraud or inequitable conduct causes workers to misunderstand the employer's benefit commitment.[216] An SPD that is carefully crafted to

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[214] *Id.* at 429-31.

[215] Amara v. CIGNA Corp. (*Amara II*), 775 F.3d 510, 530-31 (2d Cir. 2014). *Accord* Osberg v. Foot Locker, Inc., 862 F.3d 198, 202-05 (2d Cir. 2017). *See also* Nolan v. Detroit Edison Co., 991 F.3d 697, 712-15 (6th Cir. 2021) (refusing to dismiss claim brought by retiree (who had been employed as a financial analyst) that benefit accrual suspension following cash balance plan conversion was not described in a manner understandable to the average plan participant).

[216] *See supra* notes 106-116 and accompanying text.

omit or obscure notification of hazards to benefit entitlement fits this mold exactly, and in fact a class-wide remedy of plan reformation was ordered in *Amara* and like cases.[217] Where plan reformation is authorized, the equitable relief is accompanied by an order to pay benefits according to the terms of the plan as so reformed—disregarding or excising the hidden defect.[218]

Where the failure to warn is inadvertent an additional obstacle may hinder monetary remedy. Recall that silence supports equitable estoppel where there is a duty to speak, hence reliance on an SPD's failure to communicate a required warning is justified.[219] The difficulty lies in proof of reliance—many participants and beneficiaries impacted by the hidden defect won't have independent evidence that they would have acted differently had they been informed of the danger. If individualized objective proof is demanded, many plan members actually deceived by a missing warning won't get redress for their injuries, and class-wide relief will be unavailable.[220] Such widespread under-enforcement of disclosure standards would undermine career and financial planning, and attainment of ERISA's economic efficiency goal. This suggests that inadvertent failure to warn may be a domain in which the federal courts ought to entertain modifications of traditional equity norms and remedial limitations.[221] Where circumstances indicate a high probability that an omitted warning is material to a substantial segment of the workforce, that probability could be accepted as a substitute for individualized proof of causation. Such a salience-based categorical substitute for individualized proof of reliance—the elaboration of ERISA estoppel standards crafted to be responsive to statutory policy—would support class-wide relief.

2. Acceptable Omissions: Understandability

If instead of failing to warn of potential pitfalls, the SPD implies that benefits will be available more broadly than plan terms actually authorize, different considerations come into

[217] *Amara II*, 775 F.3d at 531; *Osberg*, 862 F.3d at 213 (class-wide mistake demonstrated by clear and convincing evidence where "'defendants made uniform misrepresentations about an agreement's contents and have undertaken efforts to conceal its effect'", quoting *Amara II*, 775 F.3d at 529).

[218] *See* ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2018) (claim for benefits includes suit by a participant or beneficiary "to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan").

[219] *See supra* notes 124-126 and accompanying text.

[220] *See supra* notes 129-131 and accompanying text.

[221] *See supra* text accompanying notes 151-170.

play. *Mattias v. Computer Sciences Corporation*, illustrates the problem.[222] *Mattias* involved a plan that provided partial disability benefits. The plan document defined partial disability to require that the employee be unable to perform substantial duties of her regular occupation and actually be employed in her regular occupation on a partial or part-time basis. The SPD used, but did not define, the term "partial disability." The district court recognized that "[t]he issue in this case is how a court should interpret an ERISA plan where the SPD uses words with relatively broad definitions, and the Plan Documents contain a more restricted limiting definition of those words."[223] Observing that there were "two doctrines in tension," the court attempted to reconcile them.

> First, where an SPD and the Plan Documents contradict or conflict with each other, the SPD controls. The policy rationale for this rule is that the ERISA statute contemplates that employees will depend on the SPD, and if the Plan Documents are allowed to supersede, then the SPD is useless.
>
> Second, where an SPD is silent on an issue, the Plan Documents control. The policy rationale for this view is that if silence in the SPD were enough to trump an underlying plan, then SPDs would mushroom in size and complexity until they mirrored the Plan Documents.
>
> At the extremes, these two doctrines work. This Court would have no difficulty applying them if the CSC Summary had made no mention of partial disability coverage or if the CSC Summary included a detailed definition of "partial disability" that conflicted with the CSC Plan. However this case occupies the swath where neither rule controls perfectly and where the two policies are in tension, namely where an SPD uses a term and then the Plan Documents define that term. The [CSC] Summary says that partial disability benefits are available, and the [CSC] Plan defines "partial disability." Using merely common sense, it is not obvious that this situation is either a "conflict" or "silence" on the issue of partial disability benefits.[224]

In light of the language and policy of ERISA, the court rejected the view that a conflict exists only if both the plan and the SPD explicitly define a term and those definitions conflict. Instead, it adopted a common-meaning rule, concluding "conflict occurs where an SPD uses a term and the Plan Documents define it in a fashion inconsistently with the term's common meaning."[225]

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[222] 34 F. Supp. 2d 120 (*Mattias I*), *rev'd on other grounds*, 50 F. Supp. 2d 113 (D.R.I. 1999) (concluding that plaintiff failed to prove significant reliance on or possible prejudice flowing from SPD, as required to recover in First Circuit) (*Mattias II*).

[223] *Mattias I*, 34 F. Supp. 2d at 125.

[224] *Id.* (citations omitted).

[225] *Id.* at 126. The opinion cautions that "There would be no conflict where a word has no common meaning or where it would be unreasonable for a plan member to rely thereon. That would include where an SPD

Because partial disability is ordinarily understood to mean an incapacitating condition that keeps an employee out of her job, but doesn't prevent her from working in any job, the court refused to enforce the plan's undisclosed part-time work requirement.[226]

As *Mattias* illustrates, the dichotomy between contradiction and silence is overly simplistic. The court treated the undisclosed part-time work requirement as in conflict with the plain meaning of "partial disability," a term used without definition in the SPD. From that perspective *Mattias* is another inaccurate SPD case. Alternatively, *Mattias* can be seen as a failure-to-warn case: ordinary understanding or common usage of the term "partial disability" in the SPD created a reasonable implication of coverage; not flagging the plan's idiosyncratic part-time work condition hid the circumstances that triggered ineligibility for benefits. From either standpoint, *Mattias* concerns the weight to be accorded impressions generated by the SPD's abbreviated explanation.

Abbreviated explanation is the crux of the matter. To provide workers the tools needed for career and financial planning the SPD must be understandable to the average plan participant, which requires simplification and distillation. The objective of the SPD, as emphasized earlier, is *optimal disclosure*, not full disclosure.[227] Rank and file workers will not research, sift, and analyze an avalanche of detailed technical information—instead they will rationally ignore it. Simplification and distillation typically require resort to generalizations unaccompanied by all their attendant qualifications and exceptions. Precision is the casualty of summary exposition. Consequently, it should come as no surprise that an SPD written to facilitate career and financial planning by its intended readers, average plan participants, will sometimes imply that benefits may be available in circumstances where they are not actually authorized by the plan. Tradeoffs between "understandable" and "accurate and comprehensive"

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explicitly refers to a definition in the Plan Documents, for example, by noting that the specific term was used as defined by the Plan Documents." *Id.* at 127.

[226] *Id.* Similarly, in *Heady v. Dawn Food Products, Inc.*, No. 3:03CV-26-H, 2003 U.S. Dist. LEXIS 21634 (W.D. Ky. Nov. 25, 2003), benefit eligibility under a long-term disability plan changed after 24 months from inability to perform one or more essential duties of the employee's previous occupation to the inability to perform essential duties of *any* occupation. The SPD included the former, more liberal definition of disability, but failed to indicate that after two years a more stringent test applied. The court noted that "a fine line can separate differences created by an omission and those created by a conflict." *Heady*, at *7. While the SPD technically omitted the stricter eligibility condition, the court recognized that participants had no reason to believe the SPD's definition was incomplete. Accordingly, the defect was characterized as a case of conflict rather than silence, and the court held that the SPD controls. *Id.* at *7–8.

[227] *See supra* Part I.B.

are inevitable, as Congress acknowledged.[228] When a plan member complains she was misled to her detriment, how should a court evaluate the plan administrator's compromise?

The tradeoff entails a judgment call: that exercise of discretion tags it as fiduciary action.[229] Hence ERISA's obligations of loyalty and care set the legal standard.[230] The standard of review, however, sets the intensity of judicial oversight of the administrator's decision, and so as a practical matter establishes its durability when challenged in court.

Virtually all plans today expressly grant the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.[231] Conferral of discretion triggers the limited abuse-of-discretion standard of review of a denial of benefits. Under abuse-of-discretion review the plan administrator's good faith reasonable resolution of the tension between accessible and reliable information—the honest attempt to achieve optimal disclosure—becomes virtually unassailable.[232] The administrator will be given broad latitude to condense and simplify plan terms—freedom to translate into plain English, to generalize, and to omit technical details that apply only in unusual circumstances—without being exposed to liability for not saying enough. Provided that the document describes the "plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits"[233] the plan sponsor could dispense with an extended disclaimer of warranties. The lengthy, unreadable, liability-shield SPD would provide no additional protection from liability. Hence the SPD could revert to the understandable balanced abridgement that Congress originally envisioned, and could actually serve as a basis for the typical worker's career and financial planning.

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[228] ERISA § 102(a), 29 U.S.C. § 1022(a) (2018).

[229] *See supra* note 259.

[230] ERISA §§ 3(21)(A), 404(a)(1)(A), (B), 29 U.S.C. §§ 1002(21)(A), 1104(a)(1)(A), (B) (2018).

[231] *See* Wiedenbeck *supra* note 43, at 1073-74 & nn.283-84.

[232] Commonly the plan administrator is an executive or managerial employee of the sponsoring employer. *See* ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3) (2018) (excepting insider's service as fiduciary from prohibited transaction definition). Such insider fiduciaries make disclosure determinations under a conflict of interest, such that good faith may be open to question. Yet if the plan expressly confers discretion, the limited abuse-of-discretion scope of review still applies. Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105 (2008). *See* Wiedenbeck, *supra* note 43, at 1074-85 (explaining how the allowance of insider fiduciaries combined with a limited scope of review operate to establish a safe space for employer-regarding decisions, a kind of "implicit exculpation" that runs counter to the express prohibition of ERISA § 410(a), 29 U.S.C. § 1110(a)).

[233] ERISA § 102(b), 29 U.S.C. § 1022(b) (2018).

Why hasn't this utopian vision materialized? The obstacle lies in the absence of an incentive to make the SPD understandable.[234] Administrators have not been moved to simplify and condense, so there's been no need to justify SPD omissions. Hence the shelter offered by limited judicial review has gone overlooked. It would quickly become highly salient, and hotly contested, if steps were taken to revive understandability. In that event a cautious—even skeptical—judicial attitude toward imposing liability based on an allegedly incomplete SPD becomes the essential bulwark preserving understandability. Relief would still be appropriate in instances (like *Mattias*[235]) where the omission is practically equivalent to an inaccurate SPD or a failure to warn, but otherwise a good faith attempt to summarize would defeat a plan member's complaint that more should have been said.

Incomplete SPD claims implicate disclosure objectives and priorities. Is an incentive to simplify feasible? Would reintroducing understandability further degrade reliability? Or would simplified disclosures amplify litigation pressure, inducing flight from sponsorship? Put simply, this analysis surfaces this question: Does a stable equilibrium between understandable and reliable information exist? The next part of the article argues that competing objectives can be sensibly balanced, and charts a path to accomplishing both goals Congress envisioned.

IV. Reviving Understandability

Workers must take into account pension and welfare plan coverage (and the limits thereof) to avoid costly omissions or duplications in their financial preparedness for major life events, including retirement, disability, injury and disease. Benefit plan information must be simultaneously understandable and reliable to enable each worker to advantageously incorporate it into her personal life plan. The delicate balance between understandable and reliable information—the optimal disclosure envisioned by Congress—hasn't been achieved. Instead, understandability was sacrificed as employers moved to liability-proof their disclosures.[236] At this juncture, could understandability be revived? Might ERISA's projected economic efficiency gains be reclaimed?

Two crucial components are required to resurrect understandability. First, plan administrators must be given an incentive to take understandability seriously when drafting

[234] *See supra* Part II.

[235] *See supra* notes 222-226 and accompanying text.

[236] *See supra* Part II.

the SPD. Second, they must be protected in doing so: a zone of immunity must be recognized for good faith decisions concerning the appropriate trade-off between the value of simplification and condensation (understandability) and the competing interest in completeness (reliability).

A. *Incentive to Simplify*

To usefully inform important life decisions the key provisions of a complex plan must be communicated in simplified summary form. Translation and distillation introduce imprecision and omissions. Disclosure yields the greatest net benefit when it is optimized to the needs and capacities of a particular workforce. ERISA focuses on the average plan participant, and acknowledges the tension between information that is realistically accessible (understandable) to the average worker and that which is correct and complete in every particular (reliable).[237] Yet the prevailing liability-shield (Sanskrit) SPD forsakes the middle ground.

That's because current law provides no real incentive to rein in an overly-detailed technically-worded SPD. The Labor Department is not equipped to provide advance review of proposed disclosures.[238] With very few exceptions,[239] the courts have not imposed liability for harms traceable to ineffective disclosures: employers are not called to account when warnings go unheeded because the manner of presentation obscures their meaning.[240] Nor is any civil penalty well-attuned to the task of deterring unintelligible disclosures.[241] Even if it were

[237] *See* ERISA § 102(a), 29 U.S.C. § 1022(a) (2018) (requiring the SPD to "be *sufficiently* accurate and comprehensive to *reasonably* apprise" plan members of their rights and obligations (emphasis added)).

[238] The Department abjured the task of preclearing SPDs from the outset, and so it never developed the staffing or budget that would be required to provide advance expert evaluation. *See supra* notes 85-86.

[239] The exceptions, however, lay the groundwork for the approach proposed here. *See infra* notes 247-254 and accompanying text.

[240] In 2005 the ERISA Advisory Council observed:

> [T]here is no discernable enforcement of the regulatory requirement that SPDs be understandable to the average plan participant. This lack of enforcement, combined with plan sponsors' desire to be protected from potential legal action, significantly contributes to the current trend of SPDs being written by attorneys for attorneys instead of by benefit communications specialists for plan participants.

RETIREMENT PLAN COMMUNICATIONS 2005 REPORT, *supra* note 305. *See* Transcript of Oral Argument at 39-41, CIGNA Corp. v. Amara 563 U.S. 421 (2011) (No. 09-804) (colloquy between Justice Alito and Stephen Bruce observing "the worst that can happen [to a plan sponsor issuing a lengthy unintelligible summary] ... is you could be faced with an injunction to provide a more concise and comprehensible statement"); *see also* David Pratt, *Summary Plan Descriptions After* Amara, 45 J. Marshall L. Rev. 811, 813 n.22 (2012) ("The author is unaware of a single case in which the plan administrator has been faulted for providing an SPD that was not sufficiently understandable."). *But see infra* notes 247-254 and accompanying text (discussing King v. Blue Cross and Blue Shield of Ill., 871 F.3d 730 (9th Cir. 2017), which found notice of limits on retiree health coverage not reasonably understandable).

[241] *See supra* note 89 and accompanying text.

available, post-hoc judicial assessment of the typical worker's ken would be rife with error. What's needed is an incentive for balanced drafting by the plan administrator at the outset.

Current law supplies no direct means to disrupt the protective expatiation dynamic. Because employers can publicize the advantages of a plan through other (non-SPD) communications, they face no pressure to make the SPD understandable. The risk-reward calculus would shift dramatically if the law provided that: (1) an overly-detailed official "summary" (the purported SPD) is not an SPD within the meaning of ERISA because it's not understandable by the average plan participant; and (2) the employer's informal explanations serve, alone or in combination, as the plan's functional or de facto SPD and therefore should be enforced as would an SPD, warts and all. The prospect of liability based on misleading or incomplete informal communications might create a powerful stimulus to craft a balanced, abbreviated explanation.[242] Analytically, this approach would equate an incomprehensible SPD with a missing SPD: in each case, there is no "real" (meaning ERISA-compliant) SPD due to the sponsor's failure to reasonably apprise participants and beneficiaries of their rights and obligations under the plan.[243] Cases impose liability in instances of deliberate failure to supply an SPD.[244] Where participants must get their information about the plan from informal

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[242] In theory, the Labor Department might take steps to encourage the law to develop in this direction. It could issue an interpretive regulation or general statement of policy declaring that an overly complex or lengthy explanation is *not* an SPD. And in cases where the purported SPD fails as an understandable summary, the Department might participate in litigation by participants seeking to hold the plan sponsor to representations made via informal communications, on the theory that such communications function as the plan's de facto SPD. In view of the longstanding judicial acquiescence in liability-shield SPDs, however, the plea for a declaration that a complex disclosure document is not an SPD seems to have scant chance of success. Instead of categorical rejection of a purported SPD, this article recommends a more focused approach to encouraging understandability. *See infra* IV.E.

[243] The Eighth Circuit takes the view that a disclosure document should be treated as an SPD only if it contains substantially all of the categories of information required by ERISA § 102(b), 29 U.S.C. § 1022(b), and the corresponding Labor Department regulation on the contents of the SPD, 29 C.F.R. § 2520.102-3. *E.g.*, Antolik v. Saks, Inc., 463 F.3d 796, 801-01 (8th Cir. 2006) ("If a document is to be afforded the legal effects of an SPD, such as conferring benefits when it is at variance with the plan itself, that document should be sufficient to constitute an SPD for filing and *qualification purposes*." (*quoting* Hicks v. Fleming Cos., 961 F.2d 537, 542 (5th Cir. 1992)). *See generally* Richard J. Link, Annotation, *What Documents Constitute "Summary Plan Descriptions"?*, 124 A.L.R. FED. 355 (1995 & Supp.). Superficially, this view provides support by analogy for disregarding an incomprehensible SPD. Frequently, however, the dispute centers on whether language in an ostensible SPD should be given effect if it conflicts with the terms of the underlying plan. In such cases, refusing to recognize the document as an SPD avoids application of estoppel, allowing undisclosed plan terms to prevail. *Hicks*, 961 F.2d at 542. In contrast, here the argument is that a purported SPD that is not understandable is not an SPD, and where informal communications effectively function as substitutes for the SPD they should be enforced (including assertions and omissions of required warnings) in derogation of the underlying plan terms.

[244] A decade after the statute's enactment the Ninth Circuit held that an employer's deliberate noncompliance with ERISA's disclosure rules was sufficient to justify an order awarding a disappointed worker benefits under ERISA § 502(a)(1)(B), even if the worker was ineligible under the terms of the plan. Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984). Other circuits distinguished *Blau* on the ground that it involved

communications, the argument goes, they should be protected in their reliance on those functional or de facto SPDs.

The sweeping version of this argument—that an incomprehensible SPD is a legal nullity justifying worker reliance on other communications—appears to have no support in ERISA case law.[245] That's unremarkable, because disappointed plan members have no reason to assert such a far-reaching claim. There is no civil penalty or bounty to be captured by calling out a Sanskrit SPD.[246] Therefore the participant or beneficiary is narrowly focused on avoiding application of specific plan terms, of which she was unaware, that adversely impact her. That the SPD may be undecipherable from beginning to end is not relevant to her suit.

In contrast, there is some judicial backing for the limited proposition that a specific plan requirement will not be enforced in cases where the SPD's notification is imperceptible or unintelligible. *King v. Blue Cross and Blue Shield of Illinois* is such a case.[247] At issue was the enforceability of a $500,000 lifetime limit on benefits under the United Parcel Service retiree health plan. Following passage of 2010 health care reform legislation, UPS announced the

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egregious and bad-faith disclosure violations. *E.g.*, Kreutzer v. A.O. Smith Corp., 951 F.2d 739, 744-45 (7th Cir. 1991) (unlike *Blau*, no evidence of active concealment, unfair administration, or bad faith); Simmons v. Diamond Shamrock Corp., 844 F.2d 517, 525 (8th Cir. 1988) (no active concealment). So limited, the Ninth Circuit reaffirmed *Blau*'s holding. Peralta v. Hispanic Bus., Inc., 419 F.3d 1064, 1075–76 (9th Cir. 2005); Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 971 (9th Cir. 2006). In contrast, the Third Circuit rejected nondisclosure as a justification for an award of benefits not provided by the terms of the plan. Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1170 (3d Cir. 1990).

Even absent evidence of bad-faith nondisclosure, some courts permit recovery in certain circumstances. The Second Circuit holds that complete failure to develop and provide an SPD should be treated like a summary that lacks required information: triggering liability for benefits if the failing causes "likely prejudice". Weinreb v. Hosp. for Joint Diseases Orthopaedic Inst., 404 F.3d 167, 171 (2d Cir. 2005).

The Eighth Circuit follows a similar approach where the SPD is faulty, so long as it is not hopelessly inadequate. *Compare* Dodson v. Woodmen of the World Life Ins. Soc'y, 109 F.3d 436, 439 (8th Cir. 1997) (reliance or prejudice will support recovery under faulty SPD), *with* Palmisano v. Allina Health Sys., 190 F.3d 881, 888 (8th Cir. 1999) (hopelessly inadequate SPD has no legal effect). *See* Antolik v. Saks Inc., 383 F. Supp. 2d 1168, 1174–78 (S.D. Iowa 2005) (explaining Eighth Circuit cases), *rev'd*, 463 F.3d 796, 801-02 (8th Cir. 2008). The view that liability cannot be premised on a wholly inadequate SPD apparently derives from *Hicks v. Fleming Cos., Inc.*, 961 F.2d 537 (5th Cir. 1992), which concluded that, in view of the binding effect of the SPD, in order to avoid "a trap for the unwary employer," "there should be no accidental or inadvertent SPDs." *Id.* at 542; *Palmisano*, 190 F.3d at 888 ("If a document is to be afforded the legal effects of an SPD, such as conferring benefits when it is at variance with the plan itself, that document should be sufficient to constitute an SPD for filing and qualification purposes." (quoting *Hicks*)). That rationale, of course, does not extend to informal explanations provided in instances of deliberate noncompliance with ERISA's disclosure rules. And note that the Eighth Circuit suggested in *Simmons*, *supra*, that egregious nondisclosure might trigger liability.

[245] *See supra* note 240 and accompanying text.

[246] *See supra* note 89 and accompanying text.

[247] 871 F.3d 730 (9th Cir. 2017).

elimination of the lifetime benefit cap for active employees, but the summary of material modifications (SMM), like the original SPD that it amended, applied to both the active employee and the retiree health plans. SMM provisions that did not apply to the retiree plan were marked with an asterisk. The heading "Health Care Reform" was so marked, but that heading preceded more than one and one-half pages of double-column text, composed of many paragraphs and including six boldface sub-headings. None of those paragraphs or subheadings bore an asterisk, including one labeled "Elimination of Lifetime Maximum Benefits." Instead, the sole asterisk adjacent to the "Health Care Reform" heading was meant to extend to all this material. That was not apparent, however, because the "differences in font type and size [between the heading and subheadings were] difficult to discern."[248] Therefore, a reasonable plan participant could conclude that lifetime benefit caps had been lifted from both the active employee and the retiree plans. Blue Cross, the third party administrator, refused to pay most of Linda King's $950,000 of medical expenses for back surgery and rehabilitation because it exceeded the retiree plan's $500,000 lifetime maximum.[249] The Ninth Circuit ruled that the SMM violated ERISA's disclosure requirements because it "[did] not reasonably apprise the average plan participant that the lifetime benefit maximum continues to apply to the Retiree Plan."[250] "[A]t bottom," said the court, "the document was not 'written in a manner calculated to be understood by the average plan participant.'"[251] The Court of Appeals remanded the case for clarification of what type of equitable remedy the plaintiff sought and determination of the appropriate remedy. Observing that failure to make clear that the lifetime benefit maximum still applied to the retiree plan "was critical to Mrs. King, who [was a spousal beneficiary under the UPS plan and] could have obtained health insurance to cover the cost of her medical care

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[248] *Id.* at 735. *See id.* at 738 (quoting district court observation that "the distinction in font type without more, such as indentation of the subheadings, numbering, or different sized text may not even alert the average plan participant that the Arial headings are 'major headings' and that the Times New Roman headings are subheadings within each major heading"). An appendix to the opinion reproduces the SMM at issue, confirming the subtlety—or imperceptibility—of the typeface differentiation. *Id.* at 748-50.

[249] *Id.* at 737.

[250] *Id.* at 740.

[251] *Id.* at 742. To like effect is *Moyle v. Liberty Mutual Retirement Ben. Plan*, 823 F.3d 948, 962-63 & n.7 (9th Cir. 2016), which held that the SPD of a plan which granted credit for service rendered to a predecessor employer for purposes of eligibility to participate and vesting failed to provide an understandable warning that such past service would not be counted for purposes of benefit accrual (i.e., in determining the amount of earned retirement savings).

through her own employment”,[252] the opinion strongly implies that the record established reasonable detrimental reliance—the requisites for estoppel.

While *King* held that one important component of ERISA’s required disclosures violated the understandability standard, it did not find that the entire composite document (SPD plus multiple SMM amendments) was too long and complicated to qualify as an SPD.[253] Rather than a globally defective SPD, *King* exemplifies a discrete failure to effectually warn.[254] The crucial lesson, however, is that without declaring the purported SPD wholly ineffectual a court can find one essential element incomprehensible. That finding clears the path to a determination that the plan sponsor is bound by communications supplying required missing intelligence. Equitable relief could be granted if the representations that actually operate to inform workers (1) conflict with the terms of the plan, (2) are imperceptibly self-contradictory, or (3) fail to alert plan members to important hazards.[255]

Thanks to their promotional tone, informal communications seem likely to generate many failure-to-warn claims. Participants given a copy of a liability-shield SPD will rationally ignore it, receiving no actual notice of important conditions or limitations on plan benefits. Benefit claims oblivious to the plan’s (obscure) technical criteria will be submitted for payment. In due course such claims will be rejected, because they are not authorized by the terms of the plan. In response, the disappointed participant can bring suit seeking appropriate equitable relief to redress the administrator’s violation of ERISA’s SPD standards. The complaint will assert that the administrator is estopped from invoking the plan’s effectively undisclosed conditions or limitations on benefit eligibility. If pro forma issuance of practically invisible cautionary language (in the purported SPD) were disregarded,[256] and if informal

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[252] 871 F.3d at 744, *id.* at 737.

[253] The *King* court noted that the original SPD for the UPS health plans was 96 pages long, and had been amended by 12 noncumulative summaries totaling 25 pages, so that “to determine the current language for each benefit provision, a plan participant must read the relevant section from the 2006 SPD and then read all twelve summaries of the plan modifications.” 871 F.3d at 734.

[254] *See supra* Part III.C.1.

[255] *See supra* Part III.A (inaccurate SPD), III.B.2 (misleading self-contradictory SPD), and III.C.1 (failure to warn).

[256] Current case law does not categorically disregard the contents of a complex liability-shield SPD, however. *See supra* notes 245-246 and accompanying text. Notwithstanding its opacity, participants and beneficiaries may be deemed to have notice of plan terms. *See infra* Part IV.D. Limiting that constructive notice may be the most practicable means of reviving understandability. *See infra* Part IV.E.

communications (collectively, the functional SPD) are silent on the matter, then the statutory duty to warn is violated. Silence in the face of a duty to speak equates to an affirmative representation that the plan imposes no such threatening condition, supporting estoppel.[257]

Instead of inducing optimal disclosure, there's risk that this sort of countervailing legal exposure would trigger flight from plan sponsorship. Aiming at optimal disclosure, plan sponsors would reasonably object, puts the administrator in an untenable position. The employer could be sued for saying either too much or too little. That dilemma illuminates the critical need for guardrails on liability. A zone of immunity for reasonable good-faith efforts to provide balanced information is essential.[258]

B. Zone of Immunity

The best accommodation between understandability and reliability demands a difficult judgment call—the optimum will rarely be indisputable. Countervailing incentives cannot ensure that the plan administrator will identify some theoretically perfect solution. Exposure to potential liability for missing the mark in either direction, while meant to drive sponsors away from the extremes toward the middle ground, instead might drive employers away from plan sponsorship altogether. Exposing the SPD drafter to liability for telling workers either too much (not understandable) or too little (not sufficiently accurate and comprehensive) as determined by a judge in hindsight would create a fearful Catch-22, leading companies to reassess the wisdom of continued voluntary provision of pension and welfare benefits. A zone of immunity for reasonable albeit imperfect attempts to strike a balance between understandable and reliable information is essential.

ERISA fiduciary law offers tools to fashion such a safe zone. The proper balance between "understandable" and "sufficiently accurate and comprehensive" information entails an exercise of judgment by the plan administrator, and such discretionary decision-making is therefore a fiduciary act under ERISA.[259] If the plan document includes an express grant of discretionary

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[257] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981); RESTATEMENT (SECOND) OF TORTS § 536 (1977) ("If a statute requires information to be furnished, filed, recorded or published for the protection of a particular class of persons, one who makes a fraudulent misrepresentation in so doing is subject to liability to the persons for pecuniary loss suffered through their justifiable reliance upon the misrepresentation in a transaction of the kind in which the statute is intended to protect them."); EMPLOYEE BENEFITS LAW 13-83 to 13-84 (Invelisse Berio LeBeau ed., 4th ed. 2017). *See supra* Part III.A.3.

[258] *See infra* Part IV.B.

[259] ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (2018); 29 C.F.R § 2520.102-2(a) (1977) (providing that the plan administrator, in writing the SPD to be understandable and sufficiently comprehensive, "shall exercise

authority to implement the plan then the administrator's determinations on disclosure should, if challenged in court, be subject to the restricted abuse-of-discretion standard of review.[260] Under that relaxed level of judicial oversight, the balance struck by the plan administrator will be upheld if it falls within a range of reasonableness—it need not be the "correct" result (meaning, as a practical matter, the outcome that seems best to a judge in hindsight).[261] Therefore, the plan administrator's resolution of the tension between understandable and reliable information is very likely to withstand attack, which would of course deter challenges in the first place.

Securing an appropriate zone of immunity requires clearing two obstacles. The first concerns the scope of discretionary decision-making. Deferential review applies only to discretionary fiduciary determinations, yet many disclosures arguably proceed from mandatory duties. In particular, the SPD "shall contain" a description of "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits".[262] Many successful challenges to SPD adequacy assert failure to warn, or could be reframed as such.[263] If interpreted as an unyielding mandate, the duty to warn broadly exposes the administrator to judicial second guessing. But if disclosure is required of every limit and qualifying condition, what becomes of the understandable "summary"?

The obligatory phrasing of the duty to warn doesn't tell the full story. The apparent mandate in the specification of SPD contents, section 102(b), is qualified by section 102(a), which provides that the SPD "shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be

considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan"); *see* ERISA PRINCIPLES *supra* note 83, at 110-12 (discussing centrality of discretionary authority in fiduciary classification).

[260] *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). If the plan does not contain an express grant of discretion, or if the grant is interpreted as not extending to disclosure decisions, then the court would apply de novo review, and would be authorized to second guess the administrator's determination. Substituted judgment means no zone of immunity, yet it should not seriously threaten continued plan sponsorship. Virtually all plans today explicitly confer discretionary decision-making powers. Wiedenbeck *supra* note 43, at 1073-74. And if the language of the grant were construed narrowly, as not protecting the administrator's disclosure choices, sponsors would quickly respond by amending their plans to fix the problem. Consequently, de novo review should present only a short-term transitional risk.

[261] *See* RESTATEMENT (SECOND) OF TRUSTS § 187 & cmts. d-g, i (1959) (explaining components of abuse of discretion review of fiduciary exercise of discretionary powers under private trust law); Varity Corp. v. Howe, 516 U.S. 489, 496-97 (1996) (observing that the common law of trusts offers a starting point that informs interpretation of ERISA's fiduciary regime).

[262] ERISA § 102(b), 29 U.S.C. § 1022(b) (2018).

[263] *See* supra Part III.C.1.

sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."[264] Three clauses—set off by commas and joined by a conjunction—jointly define the SPD. The summary must simultaneously contain specified content, be understandable, and "reasonably" inform workers of their standing with respect to the plan. The understandable description need only be "sufficiently accurate and comprehensive," not completely so. Imposing in one breath these essential attributes of a useful summary on the list of SPD contents must be taken to relax the ostensibly inflexible command of the subsection (b) duty to warn. Absent that interpretation the optimal disclosure prescription becomes, not extraordinarily difficult nor even impractical, but utterly unattainable. The Labor Department's regulatory rendition of the duty to warn incorporates the germ of this idea. It requires:

> a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery (e.g., by exercise of subrogation or reimbursement rights) of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section.[265]

Here, the duty to warn is limited to disabusing participants and beneficiaries of notions of benefit entitlement that could sensibly be engendered by ("might otherwise reasonably expect") the plan's summary description of eligibility for participation and benefits.[266]

The potentially more serious impediment to recognition of a zone of immunity adapted to inducing optimal disclosure results from plan administrators' conflict of interest. The problem here is not the scope of application of the abuse-of-discretion standard; instead it involves the intensity of review under that standard.[267] The risk is that judicial review of the administrator's decision could prove *too* lax. Abuse of discretion review—also known as the arbitrary and capricious standard—demands reasoned decision-making. Central tenets require the decision maker to consider all relevant factors and refrain from taking into account any irrelevant

[264] ERISA § 102(a), 29 U.S.C. § 1022(a) (2018).

[265] 29 C.F.R. § 2520.102-3(*l*) (2021).

[266] Tying the duty to warn to benefits that a participant or beneficiary might otherwise reasonably expect based on the required description of benefits dates from 1977. 42 Fed. Reg. 14266, 14275 (Mar. 15, 1977). The rule on required SPD contents proposed in 1975 simply parroted the statutory language of the duty to warn and added that a pension plan administrator "shall include a description of any provision of the plan relating to forfeiture of benefits, breaks in service and year of service rules." 40 Fed. Reg. 24642, 24654 (June 9, 1975).

[267] Contestation surrounding the appropriate scope or intensity (breadth or depth) of fiduciary obligations has been a pervasive, ongoing, and evolving feature of ERISA case law generally, but these two dimensions were only recently distinguished and clarified. *See generally* Wiedenbeck, *supra* note 43, at 1033-37.

factors. The criteria are set by the legislative standards for decision. Hence in SPD drafting the plan administrator must give thought to what the average plan participant can understand. Protecting workers from loss due to insufficient information is of course another relevant factor. Protecting the plan sponsor from litigation is *not* a legitimate independent consideration.[268] Plan administrators are ordinarily company insiders, infecting the disclosure tradeoff with a conflict of interest. Such fiduciary conflicts are permitted and pervasive under ERISA, but conflicted fiduciaries are still commanded to act in good faith.[269] The Supreme Court says limited judicial review under the abuse-of-discretion test applies notwithstanding the conflict.[270] In practice, this relaxed judicial oversight of conflicted decisions by insider fiduciaries implicitly tolerates some employer-regarding decisions.[271] Consequently, an insider plan administrator might skew disclosures to favor completeness over understandability without being found to have abused discretion. To that extent the insider-administrator's resolution of the tension between accessible and reliable information may not represent a good faith attempt to achieve optimal disclosure.

The conflict becomes especially acute in explaining plan amendments adopted to reduce or control costs, such as by limiting eligibility or scaling back benefits. Such amendments, involving the employer's strategic plan design decisions, constitute settlor functions exempt from fiduciary oversight.[272] The required explanation of such plan changes in the SMM or SPD, however, is a fiduciary act. That presents a dilemma, because messaging to workers is often integral to successful roll-out and achievement of the amendments' objectives. In that case, the same executive or management team that instituted the changes may naturally oversee communications, crafting them with a view toward maximizing success of employer objectives. Downplaying or obscuring alterations that disadvantage workers, if done to that end, surely

[268] ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (2018) ("fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries"); Wiedenbeck, *supra* note 43, at 1074-75 & n.288.

[269] *See* ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3) (2018) (excepting insider fiduciary from prohibited transaction rules); Wiedenbeck, *supra* note 43, at 1072.

[270] Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105 (2008); Wiedenbeck, *supra* note 43, at 1053-54.

[271] Wiedenbeck, *supra* note 43, at 1070-85 (explaining the nature and extent of implicit exculpation of ERISA's duty or loyalty).

[272] *See* Wiedenbeck, *supra* note 43, at 1024-33.

abuses discretion, but the breach may not come to light under the less-than-searching conflict of interest review protocol suggested by Supreme Court precedent.[273]

The rigor or laxity of abuse of discretion review of fiduciary decisions made in the presence of a conflict of interest is not yet settled. In the disclosure context the decisional autonomy conferred by the abuse of discretion standard of review, while substantial, is not unlimited. If the recommended approach to reviving understandability were pursued, the extent of that freedom should be monitored, lest it become too accommodating. Yet from the policy perspective it bears emphasis that, in sharp contrast to current law, abuse-of-discretion review would require showing that SPD utility was taken seriously in crafting disclosures.

Reviving understandability should induce shorter and simpler explanations at the point of entry to plan information.[274] Summation in layman's terms buys accessibility, but at some cost in reliability. Recall that understandability declined in response to judicial endorsement of claims that some SPDs were insufficiently accurate and comprehensive to reasonably apprise plan members.[275] Even today, the era of the liability-shield SPD, federal courts are bombarded with defective SPD claims and some succeed. Making the SPD (or SMM) practically informative to the actual workforce would require truly transformative simplification and distillation. Elevated pressure on reliability seems inevitable. Could review of discretionary disclosure trade-offs effectively mediate between understandability and reliability? Or would courts impose liability unpredictably and inconsistently, amplifying litigation risks, discouraging sponsorship, perhaps even crashing the system?

C. Crafting a Compromise

Some approaches to reviving understandability are unrealistic. Congress is not going to enact a civil penalty targeting opaque disclosures.[276] Nor is it likely that courts will embrace the

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[273] *See supra* note 271. Conceivably, the Labor Department might promulgate a rule to insulate drafters of the SMM or SPD from influence by management involved in shaping the plan, or requiring that any input from such parties be memorialized to become a component of the record on judicial review.

[274] This article envisions a bifurcated presentation or hierarchically-organized SPD, composed of a brief overview of most important features of the benefit program that links to more detailed explanations of the plan's benefits and the conditions necessary to qualify therefor. Electronic disclosure would enable a worker with a specific concern or in unusual circumstances to drill down to increasingly detailed and specific information applicable to her own situation. *See infra* Part IV.E.

[275] *See supra* text accompanying notes 91-314.

[276] Plan sponsors would uniformly oppose such a penalty and are well represented before Congress. In contrast to such a penalty's concentrated costs, the benefits of improved career and financial planning are subtle and diffuse, and most workers are not represented by a union.

view that an SPD may be so long and complex that it is not an SPD within the meaning of ERISA, justifying blanket reliance on other communications (de facto SPDs).[277] A regulatory nudge might do the trick, however. Rulemaking recalibrating the force of estoppel in the ERISA context—specifically the meaning of justifiable reliance—could create a powerful incentive to supply a short, understandable overview of the main features of an employee benefit plan.

The regulatory stimulus envisioned here centers on constructive notice of SPD contents. It would operate as follows. Labor Department rulemaking would prescribe a new component of the SPD, the "Overview" section. The Overview, designed to provide a brief, plain-language summary of the core terms of the plan, would have a maximum length (perhaps 4,000 or 5,000 words) and prescribed categories of content, and would extensively cross reference (via hyperlinks) more detailed explanations of plan members' rights and obligations.[278] The more detailed explanations could well be the contents of an existing plan's current SPD, but the portions relevant to a specific matter would be easily accessed from Overview links.[279] The new rule would provide that an SPD containing a satisfactory Overview constitutes *constructive notice* of plan terms, such that participants and beneficiaries could not justifiably rely on non-SPD communications about the plan.[280] A proper Overview, in other words, would yield an affirmative defense to estoppel claims based on non-SPD communications that are at variance with plan terms. Conversely, the rule would also specify that an SPD without a proper Overview would be deemed *not understandable* to the average plan participant and would *not provide constructive notice* of plan terms. As such, non-SPD communications could be enforced against the administrator or plan fiduciary responsible for such communications, except where the defendant can produce evidence that the claimant had actual knowledge of contrary plan terms. Absent an Overview, the SPD would be just one among many fiduciary communications about the plan, any of which might provide grounds for equitable relief. With a proper

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[277] *See supra* notes 245-246 and accompanying text.

[278] ERISA § 109(c), 29 U.S.C. §1029(c) (2018), authorizes the Secretary of Labor to "prescribe the format and content of the summary plan description".

[279] The proposed SPD overview is similar to the "quick reference guide" recommended by the 2017 ERISA Advisory Council. *See infra* notes 314-318 and accompanying text. But as noted in the Appendix, *infra* text accompanying note 319, the Council did not recommend associated adjustments to disclosure liability.

[280] ERISA § 505, 29 U.S.C. § 1135 (2018), grants the Secretary of Labor power to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions" of ERISA Title I.

Overview, the SPD would be accorded primacy, and the sponsor would (within limits explained below[281]) be protected from liability based on other communications.

This proposal does not stray far from current law. As explained immediately below, courts have resisted application of estoppel to non-SPD assurances, but that stance is limited by expanded fiduciary disclosure liability.[282] And if the SPD is not understandable, refusing to accord binding effect to other communications ill serves ERISA policies. Hence the suggested regulation would potentially spur understandability while simultaneously clarifying and rationalizing ERISA disclosure law. The case law governing non-SPD communications demonstrates existing support for—and the limits of—a constructive notice (no estoppel) rule.

D. Non-SPD Communications

Apart from the summary, can the employer be bound by oral or written communications concerning plan content? The prospect of financial exposure flowing from non-SPD or informal communications alarms plan sponsors, and goes to the heart of ERISA's disclosure policy.

Courts have resisted enforcement of non-SPD communications for a number of reasons. Complaints about harmful informal communications most often come before the courts as claims for equitable relief to redress a violation of ERISA, typically by way of estoppel.[283] Framed as an estoppel plea, the representation and the context in which it was made sometimes casts doubt on whether reliance was real or reasonable. Relatedly, reluctance to credit other communications stems from an interest in encouraging resort to the SPD as the primary source of plan-related information. Protecting the plan or its sponsor from unpredictable unintended liabilities is an especially salient policy concern in this arena.

Those objections carry considerable weight in certain circumstances. Yet decisional law recognizes that relief from some types of mistaken informal messaging is warranted. After canvassing policy considerations weighing against enforcing non-SPD communications, the

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[281] *See infra* notes 296-298 and accompanying text.

[282] *See infra* Part IV.D.

[283] ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2018). The predicate statutory violation lies in the communication breaching fiduciary obligations, *id.* § 404(a), or failure to supply a legally-sufficient SPD, *id.* § 102. The most commonly recognized SPD defects involve inaccuracies or failures to warn (discussed *supra* Parts III.A, III.C.1), but lack of understandability can be a viable claim in some circumstances (*supra* notes 247-254 and accompanying text).

limits on those arguments will be explored in search of coherent guides that advance ERISA's disclosure objectives.

The SPD was intended to ensure that employees have on hand a reliable source of understandable information about the plan. If workers have ready access to solid information, perhaps they should be savvy enough to check the veracity of other representations against the SPD. That stance arguably makes reliance on conflicting communications unworthy of protection. Refusing estoppel—in effect, holding reliance unjustified as a matter of law—amounts to imposing a duty of inquiry on participants and beneficiaries. Such a duty of inquiry would reinforce the primacy of the SPD, spurring better-informed decision making (the planning function). Disclosure was also intended to promote the self-policing of employee benefit plans. A duty to check the SPD might cause participants to identify errors and ambiguities in the employer's representations, which should lead to corrections or clarifications (the compliance function). Hence the actions of a few vigilant participants to protect themselves will also alert the employer to steps that can be taken to avoid misunderstandings generally (the collaboration function). This perspective suggests that reliance on communications inconsistent with the SPD ordinarily should be deemed unjustified. In addition to serving the functions of disclosure, refusing estoppel reassures plan sponsors that an undertaking to provide benefits will generate predictable obligations: incautious remarks will not magnify costs.

In contrast, widespread application of estoppel, the argument goes, protects unthinking acceptance of any plausible assertion. Estoppel both promotes litigation and leads to the non-uniform application of plan provisions, as a series of "special deals" arises from enforcement of ill-considered employer representations.[284]

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[284] Numerous cases hold that other writings cannot override the plan summary, but most involve informal assurances of lifetime health benefits juxtaposed against an SPD that reserves to the plan sponsor the unconditional right to amend or terminate the plan. *E.g.*, Gable v. Sweetheart Cup Co., 35 F.3d 851, 857 (4th Cir. 1994) ("ERISA prohibits informal written or oral amendments of employee benefit plans, and references to lifetime benefits contained in non-plan documents cannot override an explicit reservation of the right to modify contained in the plan documents themselves.") (citations omitted); Alday v. Container Corp. of Am., 906 F.2d 660, 665–66 (11th Cir. 1990) (personal benefits summary, letters sent to employees nearing retirement and documents accompanying retirement seminars cannot override unambiguous language of SPD reserving right to terminate plan); Moore v. Metro. Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988) (where filmstrips and articles in employee newspapers referred to lifetime benefits without mention of reserved amendment power, the court held that "absent a showing tantamount to proof of fraud, an ERISA welfare plan is not subject to amendment as a result of informal communications between an employer and plan beneficiaries").

Starting with *Nachwalter v. Christie*,[285] a long line of cases refuses to apply estoppel to permit oral modifications of employee benefit plans. Parol variance claims are properly rejected because the conditions of estoppel cannot be satisfied.[286] If an understandable SPD gives participants ready access to trustworthy plan information, reliance on oral representations that contradict the summary cannot be reasonable or justifiable.[287] (ERISA's writing requirement serves as a statute of frauds.) In addition, giving effect to such informal assurances could give rise to a series of unauthorized commitments to favored participants which would drain funds from the plan and in certain circumstances could jeopardize the continued benefits of other employees.[288]

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[285] 805 F.2d 956, 960 (11th Cir. 1986).

[286] *See, e.g.*, Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226, 235 (3d Cir. 1994) (reasonable reliance required); *In re* Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 58 F.3d 896, 908 (3d Cir. 1995) ("[A] participant's reliance on employer representations regarding benefits may never be 'reasonable' where the participant is in possession of a written document notifying him of the conditional nature of such benefits."); Schmidt v. Sheet Metal Workers' Nat'l Pension Fund, 128 F.3d 541, 546 (7th Cir. 1997) ("[O]ral representations that conflict with the terms of a written plan [in this case, including the SPD] will not be given effect, as the written instrument must control."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) & cmt. b (1979) (reasonableness of promisee's reliance and formality with which promise is made are factors bearing on whether enforcement necessary to prevent injustice).

[287] Even oral representations that purport to reflect plan amendments (thereby explaining away the SPD inconsistency) should be dismissed because ERISA requires authentic plan changes to be reported to participants in *writing*, via a summary of material modifications (SMM). ERISA §§ 102(a), 104(b)(1), 29 U.S.C. §§ 1022(a), 1024(b)(1) (2016).

[288] Courts have sometimes refused to give effect to informal worker-friendly representations in part out of concern that such changes may render the plan underfunded, jeopardizing payments to other participants and beneficiaries. *E.g., Nachwalter*, 805 F.2d at 960–61; Armistead v. Vernitron Corp., 944 F.2d 1287, 1300 (6th Cir. 1991). That concern is often misplaced or overblown, however. Under a defined contribution pension plan, a participant is entitled to the balance of her account, and disbursements from that account do not affect other participants' account balances. (If, however, a defined contribution plan allocates forfeitures to the accounts of ongoing participants, oral relaxation of the plan's vesting requirements would reduce such allocations. Nevertheless, it would not jeopardize the payment of amounts already credited to other participants.)

With respect to defined benefit pension plans, it is true that oral modifications ordinarily would not have been taken into account in determining the actuarial cost of the plan and so would negatively impact funding. A defined benefit plan sponsor cannot disclaim liability for unfunded accrued benefits, however, ERISA §§ 4062(a), (b), 4001(a)(16), (18), 29 U.S.C. §§ 1362(a), (b), 1301(a)(16), (18) (2018), and a solvent sponsor cannot terminate an underfunded plan. ERISA § 4041(a), (b), 29 U.S.C. § 1341(a), (b) (2018) (voluntary "standard" termination of single-employer plan authorized only if plan assets are sufficient to satisfy all benefit liabilities). Consequently, the disbursement of larger benefits to some employees pursuant to an oral modification, even if it creates or increases underfunding, triggers an increase in the employer's cost. Kimberly A. Krawolec, Comment, *Estoppel Claims Against ERISA Employee Benefit Plans*, 25 U.C. Davis L. Rev. 487, 559–62 (1992). Conceivably, the employer might respond to that cost increase by reducing *future* benefit accruals under the plan, but it cannot reduce benefits already earned. ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1) (2018); *accord* I.R.C. § 411(d)(6) (corresponding tax qualification rule).

Some courts apply estoppel against welfare plans on the ground that actuarial concerns vanish where there is no fund to deplete. *E.g.*, Black v. TIC Inv. Corp., 900 F.2d 112, 115 (7th Cir. 1990) (allowing estoppel against unfunded welfare plan); *Armistead*, 944 F.2d at 1300 (allowing estoppel against insured welfare plan). Yet actuarially unanticipated benefit increases under welfare plans (whether unfunded or insured) lead to the same

The no-estoppel rule originated in cases involving unduly favorable oral representations about the plan. Compared to oral assertions, written representations are more permanent and verifiable, and apparently more deliberate. The mode of communication does not convey an implicit caveat respecting dependability, and so workers may be more inclined to credit a writing that contradicts the SPD. Nevertheless, the no-estoppel rule was soon extended to informal written communications at odds with the current SPD.[289] Inconsistent writings engendered no greater respect from the courts, which have been keen to protect the plan sponsor from increased benefit liability exposure.

Courts should not enforce non-SPD communications if the participant or beneficiary knows or *should know*—has actual or constructive notice—that the information they contain is mistaken or dangerously incomplete. But what information is reasonably knowable? The policy arguments just surveyed against enforcement of informal communications are premised on workers having ready resort to intelligible superior information. Often, they don't.

The SPD cannot fairly be characterized as the paramount font of knowledge in some important circumstances. For one, informal communications may be enforced by estoppel when a participant or beneficiary detrimentally relies on a statement interpreting an ambiguous plan provision.[290] Interpretation supplements plan terms rather than overriding them. Accordingly, the plan member advised of the interpretation could not detect an inconsistency. Similarly, communications resolving an ambiguity in an understandable SPD would raise no red flag, and would naturally induce reliance.

In addition, advice from fiduciaries—officials obligated to act prudently and solely in the interests of participants and beneficiaries—often carries its own seal of authenticity and believability. If an informal communication is issued by a plan official apparently acting in a

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sort of future cost escalation as under defined benefit pension plans, which might induce the sponsor to trim the program's *prospective* generosity, or even jeopardize its continuance.

[289] *E.g.*, Alday v. Container Corp. of Am., 906 F.2d 660, 665–66 (11th Cir. 1990) (extending *Nachwalter* to contradictory written communications); Moore v. Metro. Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988) ("absent a showing tantamount to proof of fraud, an ERISA welfare plan is not subject to amendment as a result of informal communications between an employer and plan beneficiaries").

[290] *E.g.*, Kane v. Aetna Life Ins. Co., 893 F.2d 1283, 1285 (11th Cir. 1990) (distinguishing *Nachwalter*, 805 F.2d 956); Greany v. W. Farm Bureau Life Ins. Co., 973 F.2d 812, 821–22 (9th Cir. 1992); Slice v. Sons of Norway, 34 F.3d 630, 634–35 (8th Cir. 1994); Law v. Ernst & Young, 956 F.2d 364, 369–72 (1st Cir. 1992). *See also* Spink v. Lockheed Corp., 125 F.3d 1257, 1261–63 (9th Cir. 1997) (estoppel available where employee relied on oral and written statements that apparently resolved an inconsistency in the provisions of the plan).

fiduciary capacity,[291] then the attendant duties of loyalty and care assure plan members that reliance is justified. Trusting advice coming from an executive who may be pursuing the employer's business interest is naïve and risky. But checking guidance provided by a plan official who is both better informed and obligated to act for the exclusive purpose of providing benefits is wasteful and unnecessary.[292] In some situations it's simply impossible: fiduciary representations may address matters on which the SPD is silent, like the future status of the plan (e.g., probability of amendment or termination). In such cases fiduciaries are held liable for harms caused by careless or disloyal communications.[293]

These strands of decisional law support the proposition that reliance on non-SPD communications should be protected in circumstances where reliance is reasonable. Now apply that insight to the modern liability-shield SPD. Checking representations against the SPD cannot work if the SPD fails to convey understandable information. Instead of a balanced understandable summary (optimal disclosure as envisioned by Congress) the SPD has morphed into a bloated unreadable liability shield written by plan lawyers to deter plaintiffs' lawyers. Consequently, plan participants and beneficiaries cannot confirm the veracity of other representations at minimal expense. Practically, informal communications are often the sole means by which plan members can learn about their benefit rights and obligations. Moreover, the employer issuing a lengthy complex liability-shield SPD does so knowing that the

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[291] *See* Varity Corp. v. Howe, 515 U.S. 489, 505 (1996) (holding corporate executives' assurances of the continuance of plan benefits were fiduciary acts where the corporation created the impression that the executives were speaking on behalf of workers interested in the plan); ERISA PRINCIPLES, *supra* note 83, at 93-98 (explaining that *Varity* adopts an apparent authority approach to identifying functional or de facto information fiduciaries); *id.* at 112 (defining de facto fiduciaries).

[292] *See supra* note 190 and accompanying text.

[293] *Varity Corp.*, 515 U.S. 489, involved communications concerning the future of the plan, and supports the principle that communications concerning nonfiduciary acts, such as the likelihood of plan amendment or termination, can be a fiduciary function.

Similarly, a line of appellate cases beginning with *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988)., finds material misrepresentations concerning the likelihood of future benefit enhancements breach the administrator's duty of loyalty even though the decision to offer such retirement bonuses is a nonfiduciary business decision. Thus some communications made prior to the ultimate decision to amend the plan, although necessarily predictive and therefore possibly incorrect, are subject to oversight for fidelity and prudence. *See*, *e.g.*, Beach v. Commonwealth Edison Co., 382 F.2d 656 (7th Cir. 2004); Martinez v. Schlumberger, Ltd., 338 F.3d 407 (5th Cir. 2003) (providing an in-depth analysis of the evolution of the case law); Bins v. Exxon Co. U.S.A., 220 F.3d 1042, 1049–50 (9th Cir. 2000) (en banc); McAuley v. IBM Corp., 165 F.3d 1038 (6th Cir. 1999); Hockett v. Sun Co., 109 F.3d 1515 (10th Cir. 1997); Vartanian v. Monsanto Co., 131 F.3d 264, 268 (1st Cir. 1997); Muse v. IBM Corp., 103 F.3d 490 (6th Cir. 1996); Wilson v. Sw. Bell Tel. Co., 55 F.3d 399, 406 (8th Cir. 1995); Mullins v. Pfizer, Inc., 23 F.3d 663, 668–69 (2d Cir. 1994); Fischer v. Phila. Elec. Co., 994 F.2d 130 (3d Cir.) (hereinafter *Fischer I*), *appeal after remand*, 96 F.3d 1533 (3d Cir. 1996) (hereinafter *Fischer II*); *Berlin*, 858 F.2d at 1163–64. *See also* Barnes v. Lacy, 927 F.2d 539, 544 (11th Cir.).

advantages of the plan will have to be made clear to employees by other means.[294] Where the SPD is not understandable, plan members have no reason to know they should be skeptical of other communications, and no realistic ability to protect themselves.

This analysis suggests that SPD primacy should hinge on SPD understandability. Arguably, an estoppel claim based on a non-SPD communication that is at variance with plan terms should be rejected if the claimant was able to check the representation, even if she failed to do so and was actually unaware of the inconsistency. If the SPD is not understandable to the average plan participant, however, such self-help is pure fantasy. Foreclosing estoppel in that case does not promote planning, compliance, or collaboration, it exposes workers to manipulation. The notion that reliance on non-SPD communications is unjustified if the participant or beneficiary has reason to know of inconsistent plan terms should be tempered by sensitive appraisal of what plan information is realistically accessible. Plan members' claims for relief based on non-SPD communications cannot fairly be repulsed with the observation, "you should have known better," if "knowing better" requires deciphering an opaque liability-shield SPD.

E. Contours of an Understandable SPD Overview

Under prevailing conditions constructive notice of SPD contents is a glaring legal fiction that thwarts disclosure's objectives. Constructive notice conditional on an understandable SPD, in contrast, might supply the impetus needed to revive understandability. Neither the courts nor the Labor Department are equipped to make case-by-case determinations of whether the SPD for a particular plan meets an overall understandability standard. The Labor Department could, however, prescribe a new component of the SPD, the SPD overview, which would provide a brief plain-language synopsis of main features of the plan. The overview would function as a readable introduction or point-of-entry for plan information, and would contain extensive cross-references (via hyperlinks) to more detailed explanations and examples of plan requirements. The more detailed explanations could well be the contents of an existing plan's current SPD: the portions relevant to a specific matter addressed in the overview would be accessed from the overview directly via pinpoint links. The essential categories of overview contents would of course vary by plan type (health care, 401(k), traditional pension plan, etc.), and regulations should set forth templates governing the overview for each plan of a specified type. These

[294] *See supra* text accompanying note 76.

template should be strictly limited in length, and should specify major topics to be addressed in the overview for plans of the specified type along with their order of presentation. It might also list topics that can be dispatched simply by stating the issue and including a targeted reference to explanations contained in the longer document. (This might include, for example, a link to a detailed schedule of benefits under a group health plan, the explanation of the extent of PBGC-guaranteed benefits under an insured defined benefit plan, or a statement of ERISA rights.[295])

Liability exposure formed the modern SPD; adjusting exposure would re-form it. To that end, regulations should provide that an SPD containing an overview having the prescribed characteristics generally provides participants and beneficiaries constructive notice of plan terms, thereby foreclosing estoppel claims based on other communications (a conclusive presumption that reliance is unjustified). At least equally important, the regulation should also specify that an SPD without a proper overview will *not* support constructive notice of plan terms, such that courts will entertain estoppel claims founded on non-SPD communications.

The constructive notice triggered by an SPD with a proper overview should confer only qualified protection. It should not defeat all disclosure violation claims.[296] The SPD (meaning the composite of overview and linked explanation and examples) would still violate ERISA if found inaccurate (at odds with the terms of the plan) or latently self-contradictory.[297] Incomplete SPD claims would be another matter, however. The goal of the overview is to provide a short, simple overlay that emphasizes the plan's core terms and conditions and directs workers with specific concerns to more in-depth pertinent information. The composite SPD will likely contain all the protective expatiation typical of contemporary liability-shield SPDs. That alone should not immunize it from harmful omission claims because of the need to balance understandability and reliability. Workers' career and financial planning would not improve if the overview were purely promotional, highlighting the attractive features of the benefit program and leaving all the limits, conditions, and qualifications buried in the extended explanation. The overview should be both understandable and evenhanded, and the allocation of information between the overview and the underlying explanation should be thoughtful.

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[295] *See* 29 C.F.R. § 2520.102-3(j)(2), (m), (t) (2021).

[296] In particular, claims based on communications relating to matters beyond the scope of SPD would not be foreclosed. Because the SPD does not address the future of the plan, representations concerning the likelihood and nature of possible plan changes cannot be checked against the summary. Hence harms resulting from imprudent or disloyal representations by fiduciaries about prospective benefits could redressed via suit for breach of fiduciary duty. Likewise, advice interpreting an ambiguous SPD is not susceptible to verification. *See supra* notes 290-293 and accompanying text.

[297] *See supra* Parts III.A, III.B.

A limited scope of review offers the mechanism to achieve these goals. In all likelihood, many decisions will be informed only by the overview. Accordingly, the overview's description of benefits must alert workers to crucial conditions and limitations on those benefits.[298] But the overview cannot disclose every possible adverse contingency and remain readily comprehensible. Measures must be in place to prevent the overview itself from devolving into an extended disclaimer document. Judgment must be exercised in deciding which circumstances that could result in disqualification, ineligibility, denial or loss of benefits present the greatest risk to the largest number of participants and beneficiaries. Those limitations that are most commonly triggered deserve top billing—the warning belongs in the overview—while those that are rarely triggered can be adequately handled by cross references to explanations and examples appearing in the rest of the SPD. Break in service rules used to determine participation or vesting under a traditional pension plan, or subrogation rights to a health plan participant's tort claim, exemplify serious risks applicable in limited special circumstances. Topics such as these seem fit candidates for brief mention in the overview accompanied by links to treatment in the body of the SPD.

Plan administrators would exercise discretion in allocating disclosures between the overview and the remainder of the SPD. That allocation decision implements the compromise between understandable and reliable information. Administrators cannot be expected to perfectly optimize the disclosure trade-off. They should be protected in making a good faith attempt to balance—to "reasonably apprise [] participants and beneficiaries of their rights and obligations under the plan." As explained earlier, that protection is available in the zone of immunity created by abuse-of-discretion review of fiduciary decisions.[299] The Labor Department should recognize and exploit the opportunity afforded by that limited scope of review to revive understandability. If it did so, the goal of increasing national economic performance by enabling worker career and financial planning might still be attainable.

CONCLUSION

ERISA's effort to promote informed financial decision-making—the statute's oft-overlooked economic efficiency objective—hasn't gotten much respect. In the aftermath of

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[298] *See* 29 C.F.R. § 2520.102-2(b) (2021) (providing, as part of the general prohibition on misleading, misinforming, or failing to inform participants and beneficiaries, that "exceptions, limitations, reductions or restriction of plan benefits shall be described or summarized in a manner not less prominent than the [format] used to describe or summarize plan benefits"); *id.* -3(*l*) (duty to warn measured by "benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide" based on its description of benefits).

[299] *See supra* text accompanying notes 258-261, 267-271.

enactment the Labor Department targeted its limited resources on controversial high-profile issues, declining to monitor plan summaries for understandability. Nor did the opposite problem of reliability—whether a summary is "sufficiently accurate and comprehensive to reasonable apprise ... participants and beneficiaries of their rights and obligations under the plan"[300]—garner administrative attention. When federal courts began awarding monetary relief to plan members injured by inaccurate or incomplete disclosures (particularly an SPD's failure to warn of "circumstances which may result in the disqualification, ineligibility, or denial or loss of benefits"[301]), plan sponsors adopted the obvious defensive measure, expanding the "summary" to cover all details and potential pitfalls in order to preclude harmful omission complaints. In the hands of plan lawyers SPDs were converted into lengthy technical disclaimer documents, but of course such liability-shield SPDs fail to effectively communicate with plan participants.

Understandability fell by the wayside, but courts continued to insist that the required disclosure of plan terms, however impenetrable it had become to workers, be reasonably accurate and comprehensive, imposing liability in some circumstances involving a mistaken or incomplete SPD. The courts of appeals, however, differed on the theory of liability: some based it on estoppel, demanding a showing of reasonable and detrimental reliance to support recovery, while other circuits treated the SPD as setting forth the essence of the deal, so that its terms governed by contract. Ultimately the Supreme Court unanimously ruled that the SPD is only commentary, it does not supply the core terms of the plan itself.[302] Hence disclosure defects can be addressed only by equitable remedies, not via breach of contract claims. The factual showing required to support equitable relief can be daunting. Particularly in the case of estoppel, persuasive (i.e., objective) evidence of specific instances of detrimental reliance—such as a worker's failure to save or to buy other insurance, or declining to seek or accept alternative employment based on an SPD that falsely inflates the generosity of plan benefits—will rarely be available. Widespread under-enforcement of the reliability standard largely immunizes employers, such that the SPD—the vehicle that Congress designed to unlock efficiency gains—has been rendered practically irrelevant.

If the SPD neither informs nor constrains—need be neither understandable nor reliable, that is—then workers will resort to other information sources. In deference to the intended

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300 ERISA § 102(a), 29 U.S.C. § 1022(a) (2018).

301 ERISA § 102(b), 29 U.S.C. § 1022(b) (2018).

302 CIGNA Corp. v. Amara, 563 U.S. 421 (2011); *see supra* Part III.A.1.

(supposed) primacy of the SPD, however, case law generally refuses to enforce such informal non-SPD communications against the plan sponsor. Fiduciary communications that misinform due to a breach of loyalty or care are an important exception, and represent the most common and viable surviving path to relief. Yet ERISA's fiduciary responsibility regime is riddled with its own set of (judicially-created) limitations and pathologies.[303] Today, it's unwise to put much stock in communications about pension or welfare benefit plans. Often, the apparent commitment can be broken with impunity.

The current state of ERISA disclosure law reduces judicial workloads and increases employers' freedom of action. In contrast to the efficiency-enhancing instrument that Congress envisioned, it abandons ERISA's goal of improved economic performance through better-informed career and financial planning. It may also contribute to the increasing standardization of employee benefit plans.[304] The declining prevalence of individually-designed plans customized to advance the personnel objectives of a particular employer may stem from workers' inability to comprehend or credit what they are told about distinctive plan features. That dynamic compounds the loss in utility of benefit programs. Along with the dashed hopes of millions of workers, the prospect of enhanced allocative efficiency must be counted among the casualties of ERISA's broken promise.

This unsatisfactory outcome need not be the end of the story. ERISA grants broad regulatory authority to the Department of Labor. Rulemaking could be utilized to adjust plan sponsors' liability exposure in ways that would spur more effective communication. The key is to secure a zone of immunity for good faith simplifications that are thoughtfully linked to more detailed expositions, while endorsing liability for misleading non-SPD communications if such an understandable entry to plan information is lacking.

[303] *See generally* Wiedenbeck, *supra* note 43.

[304] *See supra* note 66 and accompanying text.

APPENDIX

EXPERT OBSERVATIONS ON UNDERSTANDABILITY'S DEMISE

Employee benefit scholars and specialists have called attention to the disconnect between the current form of the SPD and its intended function. In 2005 the Advisory Council on Employee Welfare and Pension Benefit Plans (commonly known as the ERISA Advisory Council) concluded that "SPDs are not written in plain English because SPDs are written by attorneys for attorneys, not for plan participants, to protect the plan sponsor from legal action."[305] That state of affairs was attributed to court decisions which

> have changed the nature of the SPD from an understandable summary of the plan provisions to a binding legal description of the plan's benefits. Plan sponsors are reluctant to distribute an SPD that is written in plain English and understandable to the average plan participant because any ambiguity in the SPD may be interpreted by a court as providing a benefit the plan sponsor never intended to provide.[306]

Comparable lamentations appear in the literature to the current day. Multiple ERISA Advisory Council studies and reports document and bemoan the practice.[307] Indeed, with respect to health care plans,

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[305] ERISA ADVISORY COUNCIL, REPORT OF THE WORKING GROUP ON COMMUNICATIONS TO RETIREMENT PLAN PARTICIPANTS (2005), https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/communications-to-retirement-plan-participants [hereinafter RETIREMENT PLAN COMMUNICATIONS 2005 REPORT].

[306] *Id.* The report further observed:

> All of the witnesses stated that SPDs generally are not written in plain English but are written in "legalese." Because courts have frequently held that the provisions of the SPD control any conflicts with the provisions of the formal plan document, SPDs are written to protect plan sponsors from legal action, not to provide plan participants with basic information about their benefits. Several witnesses ... testified that because courts have given SPDs a legal standing that was not intended under ERISA or the Labor Regulations, SPDs will continue to be written by plan sponsors' attorneys for participants' attorneys rather than by benefit communication specialists for participants until this legal standing is changed.

Health and welfare benefit plan SPDs suffered from the same dynamic. ERISA ADVISORY COUNCIL, REPORT OF THE WORKING GROUP ON HEALTH AND WELFARE BENEFIT PLANS' COMMUNICATIONS (2005), https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/health-and-welfare-benefit-plans-communications [hereinafter Health PLAN COMMUNICATIONS 2005 REPORT].

[307] RETIREMENT PLAN COMMUNICATIONS 2005 REPORT, *supra* note 305; HEALTH PLAN COMMUNICATIONS 2005 REPORT, *supra* note 306; ERISA ADVISORY COUNCIL, REDUCING THE BURDEN AND INCREASING THE EFFECTIVENESS OF MANDATED DISCLOSURES WITH RESPECT TO EMPLOYMENT-BASED HEALTH BENEFIT PLANS IN THE PRIVATE SECTOR 8 (2017), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2017-reducing-the-burden-and-increasing-the-effectiveness-of-mandated-disclosures.pdf [hereinafter HEALTH PLAN COMMUNICATIONS 2017 REPORT]; ERISA ADVISORY COUNCIL, MANDATED DISCLOSURE FOR RETIREMENT PLANS–ENHANCING EFFECTIVENESS FOR PARTICIPANTS AND SPONSORS 11-12, 14 (2017),

> [t]he witness consensus was that the SPD's summary information function has been largely eliminated and that, in practice, plan administrators are distributing plan documents rather than SPDs to their group health participants. Instead of having a comprehensive plan with a brief, understandable summary document, as originally intended; the SPD typically serves as the plan document.[308]

"As a result, over time, the SPD's language has become more technical and the SPD longer."[309] For example, in 2020 Washington University offered its faculty and staff a choice between five self-insured health care plans, each administered by United Healthcare, each with its own SPD "designed to meet your information needs and the disclosure requirements of [ERISA]."[310] The SPDs range in length from 150 to 165 pages, and each is introduced with the admonitions, "Read the entire SPD" and "Many of the sections of this SPD are related to other sections. You may not have all the information you need by reading just one section."[311]

Even before defensive liability-shield SPDs became ubiquitous, benefit explanations were written at a level substantially above the reading ability of the average worker.[312] More

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https://www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2017-mandated-disclosure-for-retirement-plans.pdf [hereinafter RETIREMENT PLAN COMMUNICATIONS 2017 REPORT]. *See also* ERISA ADVISORY COUNCIL, PROMOTING RETIREMENT LITERACY AND SECURITY BY STREAMLINING DISCLOSURES TO PARTICIPANTS AND BENEFICIARIES (2009), https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2009-promoting-retirement-literacy-and-security-by-streamlining-disclosures-to-participants-and-beneficiaries [hereinafter RETIREMENT PLAN COMMUNICATIONS 2009 REPORT] ("Participants may not read or understand the notices they receive, and the notices are often not designed to enhance retirement literacy and security.").

[308] HEALTH PLAN COMMUNICATIONS 2017 REPORT, *supra* note 307, at 13. *See, e.g.*, Koehler v. Aetna Health Inc., 683 F.3d 182, 185 (5th Cir. 2012) ("in this case the summary's text is simply a verbatim copy of the underlying plan provisions"). E. Thomas Veal, *Chiseled in Stone or Written on Water?: the Status and Effect of ERISA Plan Documents*, 2013-9 NYU REVIEW OF EMPLOYEE BENEFITS § 9.03 ("In many instances the SPD serves dual duty as the primary plan document *and* summary of plan terms or is explicitly incorporated into the plan." (footnotes omitted)).

[309] HEALTH PLAN COMMUNICATIONS 2017 REPORT, *supra* note 307, at 14.

[310] *E.g.*, Summary Plan Description, Washington University Choice Plus Basic Plan, Effective Jan. 1, 2020, Group Number 702111, at 1. The SPD starts by disavowing efficacy as the operative plan document: "If there should be an inconsistency between the contents of this summary and the contents of the Plan, your rights shall be determined under the Plan and not under this summary." *Id.* But compare the following additional admonition: "If there is a conflict between this SPD and any benefit summaries (other than Summaries of Material Modifications) provided to you, this SPD will control." *Id.* at 2.

[311] *Id.* at 2.

[312] Jerry Haar & Sharon Kossack, *Employee Benefit Packages: How Understandable Are They?*, 27 J. BUS. COMMUN. 185, 193-95 (1990); *see also* James F. Stratman, *Contract Disclaimers in ERISA Summary Plan Documents: A Deceptive Practice?*, 10 INDUS. REL. L.J. 350, 364 (1988) (finding 85% of the subjects in an experiment on SPD comprehension did not even notice an SPD disclaimer clause printed in a smaller typeface near the end of the document); *Benefit Eligibility is Misunderstood by Plan Participants, GAO Report Says*, 14 PENS. REP. (BNA) 1287 (1987) ("GAO report suggested that many SPDs may be too technical for workers to fully comprehend").

recently, a 2006 empirical study of health plan SPDs found that important information was often difficult to identify, and concluded that "the language used to convey important information in the [SPD] may be written at a level that is too high for its intended audience—the '*average* plan participant'—to understand."[313]

The 2017 ERISA Advisory Council made recommendations designed to adapt current practice—the prevalence of the liability-shield SPD—to better serve the planning function and promote economic efficiency. "[T]he SPD has developed into a behemoth document that does not serve participant interests because it is so detailed that it discourages participants from reading it at all."[314] In response, the Council recommended development of an introductory section to the SPD, a "quick reference guide," that would provide a brief summary of the most pertinent aspects of the plan, those "that play a critical role in [participants'] retirement readiness."[315] As envisioned by the Council, the quick reference guide would contain links or cross-references to the relevant portions of the full SPD. The quick reference guide would be distributed annually, allowing sponsors to dispense with issuing the SPD periodically every five or ten years and a new SMM each year following a plan amendment.[316] As an appendix to its report, the Council presented a model quick reference guide for a typical 401(k) plan—the model is only five pages long.[317] The Council also recommended the creation of a corresponding quick reference guide for group health plans that would be distributed annually in conjunction with the plan's summary of benefits and coverage (SBC).[318] The guide would provide an introductory overview of the most

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313 Colleen E. Medill et al., *How Readable Are Summary Plan Descriptions for Health Care Plans?*, 27 EBRI NOTES 1, 8 (2006), at https://www.ebri.org/publications/notes/index.cfm?fa=notesDisp&content_id=3756.

314 RETIREMENT PLAN COMMUNICATIONS 2017 REPORT, *supra* note 307, at 14.

315 RETIREMENT PLAN COMMUNICATIONS 2017 REPORT, *supra* note 307, at 15.

316 RETIREMENT PLAN COMMUNICATIONS 2017 REPORT, *supra* note 307, at 15. In addition to links from the quick reference guide, the "complete SPD would remain available to participants and continue to be provided upon initial enrollment and as requested thereafter, satisfying the requirements under the regulations to be 'sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan.'" *Id.* at 17.

317 RETIREMENT PLAN COMMUNICATIONS 2017 REPORT, *supra* note 307, at 39-43.

318 Health PLAN COMMUNICATIONS 2017 REPORT, *supra* note 307, at 17-18. The SBC is a simplified disclosure vehicle mandated by the Affordable Care Act for group health care plans. It provides a condensed overview of plan benefits and coverage in a uniform format, using uniform definitions of standard insurance and medical terms, to facilitate comparison of cost, coverage, benefits, and exceptions. ERISA § 715(a)(1), 29 U.S.C. § 1185d (2018), 42 U.S.C. § 300gg-15 (2018).The SBC must utilize terminology understandable by the average plan enrollee, include examples of coverage for common benefit scenarios, and be presented in a standardized template that does not exceed four double-sided pages in length, and does not include print smaller than 12-point font. While the SBC does not legally substitute for the SPD, it supplies a condensed summary that facilitates comparisons between insurance alternatives.

important features of the plan, and it would link to the full SPD, to the SBC, and to lists of participating medical providers and prescription drug formularies.

In some respects the quick reference guide envisioned by the 2017 ERISA Advisory Council is comparable to the SPD overview recommended here in connection with the disclosure optimization dilemma.[319] Both contemplate a brief, balanced, readable exposition of principal plan features, accompanied by guided links to detailed content. To solve the optimization problem, however, more than a meta-SPD is needed. In addition, the presence or absence of an adequate overview must shape liability exposure.

Benefit plan communication issues drew high-level attention during the Trump Administration. Executive Order 13847 mandated that the Secretary of Labor, in consultation with the Secretary of the Treasury,

> complete a review of actions that could be taken through regulation or guidance, or both, to make retirement plan disclosures required under ERISA and the Internal Revenue Code of 1986 more understandable and useful for participants and beneficiaries, while also reducing the costs and burdens they impose on employers and other plan fiduciaries responsible for their production and distribution.[320]

The order does not admit that "understandable and useful for participants" could be at odds with "reducing the costs and burdens" imposed on employers. The Labor Department responded by developing a safe-harbor rule allowing retirement plan disclosures to be posted online,[321] estimating that by eliminating printing and mailing costs its notice-and-access method of electronic disclosure would yield net savings of $3.2 billion over 10 years.[322] The rule does not address understandability, but the proposed rule's preamble observed that "a notice and access framework also facilitates … interactivity, just-in-time notifications, layered or nested information, word and number searching, engagement monitoring, anytime or anywhere access, and potentially improved visuals, tutorials, assistive technology for those with disabilities, and translation software" and requested information on additional measures the Labor Department could take in the future to improve the effectiveness of ERISA disclosures,

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[319] *See supra* Part IV.C. IV.E.

[320] Donald J. Trump, Strengthening Retirement Security in America, Exec. Order No. 13846, §2(c), 83 Fed. Reg. 45321, 45322 (Sept. 6, 2018).

[321] 29 C.F.R. §§ 2520.104b-1(f), 2520.104b-31 (2021).

[322] Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, 85 Fed. Reg. 31884, 31911-12 (May 27, 2020).

including a list of specific questions.[323] Although the thorny issue of understandability was left for another day, this White House and Cabinet-level attention attests to the topic's continuing importance.

[323] Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, 84 Fed. Reg. 56894, 56908-10 (proposed Oct. 23, 2019).