

ERISA DOES NOT GIVE EMPLOYERS A FREE PASS: REFUSING TO PLACE THE BURDEN OF CARELESS DRAFTING ON THE EMPLOYEE*

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I. INTRODUCTION

In December 1963, the Studebaker Corporation shut down its facility in South Bend, Indiana.¹ Studebaker's pension plan was under-funded, and workers only received a fraction of their promised pension.² Studebaker's failure to provide full pension benefits is widely viewed as the catalyst behind legislation that eventually led to the federal Employee Retirement Income Security Act of 1974 (ERISA).³ Since then, much commentary, debate, litigation, and legislation have surrounded the issues, purposes, and requirements of ERISA.

One such debated issue concerns conflicting terms in ERISA plan documents and Summary Plan Descriptions (SPDs). While the federal circuits generally agree that the terms of an SPD govern over corresponding conflicting terms contained in plan documents, circuits do not agree on whether a plaintiff must also show reliance on the conflicting SPD language.⁴ Currently, the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits disagree on this issue, and no resolution is in sight.⁵

Specifically, courts disagree on whether a plaintiff is entitled to recover on the terms of a defective SPD despite the fact he might not have relied on the language he is now seeking to enforce.⁶ On the one hand, courts realize that ERISA is supposed to protect employees and SPDs further that goal by informing employees.⁷ On the other hand, courts are wary of giving a windfall to

* *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458 (5th Cir. 2007).

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¹ JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* 51 (2004).

² *Id.*

³ *Id.*

⁴ Michael C. Joyce, Note, *Setting a Standard to Rely on: ERISA Benefit Claims Where the Summary Plan Description and Plan Document Conflict*, 90 IOWA L. REV. 765, 772 (2005).

⁵ See *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458 n.1 (5th Cir. 2007).

⁶ *Id.*

⁷ *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 379 (3d Cir. 2003) ("The SPD is the document to which the lay employee is likely to refer in obtaining information about the plan and in making decisions affected by the terms of the plan.").

employees who never consult an SPD and then later try to assert rights under that same SPD.⁸ While this issue first appeared more than twenty years ago, soon after ERISA became law,⁹ the courts continue to disagree on the correct outcome. This Note focuses on how courts have addressed the split between the circuits, the effects of this circuit-split on ERISA litigation, and the necessity for a resolution to this problem. This author recommends the Supreme Court address this issue and find that recovery on the terms of a defective SPD should not require a showing of reliance. This resolution is the only one consistent with the purposes and history of ERISA.

II. BRIEF BACKGROUND

Congress enacted the Employee Retirement Income Security Act of 1974, as part of 29 U.S.C. §§ 1001-1461.¹⁰ According to the United States Department of Labor, “[t]he provisions of Title I of ERISA . . . were enacted to address public concern that funds of private pension plans were being mismanaged and abused.”¹¹ The Department of Labor continues to explain that, “[t]he goal of Title I of ERISA is to protect the interests of participants and their beneficiaries in employee benefit plans. Among other things, ERISA requires that sponsors of private employee benefit plans provide participants and beneficiaries with adequate information regarding their plans.”¹² The ERISA statute itself repeats this essential purpose of protecting plan participants.¹³

The issues discussed in this Note arise when an employer¹⁴ or plan administrator drafts terms in an SPD that conflict with the terms set forth in the plan documents. Common situations giving rise to these types of suits involve plan participants who have taken a break in employment or resigned.¹⁵

⁸ See *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996).

⁹ See *Govoni v. Bricklayers, Masons & Plasterers Int’l Union, Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984).

¹⁰ See generally Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2006).

¹¹ U.S. Dep’t of Labor, History of EBSA And ERISA, <http://www.dol.gov/ebsa/aboutebsa/history.html> (last visited June 3, 2009).

¹² *Id.*

¹³ 29 U.S.C. § 1001(b) (2006) (“It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . .”).

¹⁴ Although for reasons of simplicity, the term “employer” is used throughout this Note, the term is used to include plan administrators, insurers, etc. Similarly, the term “employee” is used to include persons entitled to benefits under an ERISA plan, including plan participants, beneficiaries, etc. The author acknowledges that not all employees are subject to an ERISA benefit plan, but has chosen the term for its simplicity and readability.

¹⁵ See *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 455 (5th Cir. 2007); *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 139-40 (4th Cir. 1993). Amazingly, even terms as important as the minimum service requirement necessary to obtain plan benefits often conflict in the SPD and plan documents and give rise to many of these conflicting SPD cases.

III. THE CONGRESSIONAL INTENT BEHIND ENACTING ERISA IS BEST MET
WHEN COURTS DO NOT REQUIRE PLAINTIFFS TO SHOW RELIANCE
ON SPDs

While full plan terms are included in lengthy and detailed plan documents, ERISA requires that SPDs:

shall be furnished to participants and beneficiaries. . . . The [SPD] 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.¹⁶

The language of the statute itself refers to the “average plan participant,” indicating Congress’ focus on the average employee and Congress’ concern that an average employee might not be adequately apprised of their rights if only given plan documents without a simplified explanation. However, sometimes the terms included in an SPD conflict with the terms of the actual plan itself.¹⁷ In these situations the question is: which documents govern? While many SPDs provide that plan documents shall control, courts have almost unanimously rejected this language and allowed SPDs to control.¹⁸ The rationale is that ERISA is supposed to protect employees and SPDs are supposed to inform employees.¹⁹ Both of these purposes are thwarted when courts allow employers to profit from their inaccurate SPDs as employees are left uninformed and subsequently unprotected. Allowing employers to profit from inaccurate SPDs creates the same policy concerns that lead courts to construe ambiguous or conflicting terms in a contract against the drafter.²⁰ Most importantly, *employers can avoid all issues discussed herein through more vigilant drafting and editing*. When an SPD accurately reflects the terms of the plan itself, the issue of whether a plaintiff had to rely on the conflicting term *never arises* and a lawsuit determining the parties’ rights is not needed since the terms in both the plan documents and SPD are identical.²¹

Once a court decides the SPD will prevail, the next question in these issues is whether the court will require the plan participant to show reliance on or prejudice from the SPD, and if so, what level of reliance or prejudice must

¹⁶ 29 U.S.C. § 1022(a) (2006).

¹⁷ *Murphy Oil*, 497 F.3d at 456 (“This effort at simplification, however, often produces situations in which the terms of the SPD conflict with the more detailed terms of the plan.”).

¹⁸ Michael A. Valenza, *Accuracy Is Not a Lot to Ask: Decisions in the Second and Third Circuits Set the Tone for Litigation over Conflicts Between ERISA Plan Documents and Summaries*, 6 TRANSACTIONS: TENN. J. BUS. L. 361, 367-68 (2005) (“[S]ince the passage of ERISA, courts have come to agree that an SPD is an official ERISA-governed document that will control when it conflicts with terms of the official Plan Document.”).

¹⁹ *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 379 (3d Cir. 2003) (“The SPD is the document to which the lay employee is likely to refer in obtaining information about the plan and in making decisions affected by the terms of the plan.”).

²⁰ *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1518 (10th Cir. 1996) (“Any burden of uncertainty created by careless or inaccurate drafting of the summary must be placed on those who do the drafting, . . . and not on the individual employee, who is powerless to affect the drafting . . . Accuracy is not a lot to ask.” (citing *Hansen v. Cont’l Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991))).

²¹ Valenza, *supra* note 18, at 393.

be shown?²² The most recent court of appeals decision addressing the appropriate standard of reliance applied in cases of a conflicting SPD is *Washington v. Murphy Oil USA, Inc.*²³ The issue of whether or not the plaintiff in a conflicting SPD case is required to prove reliance on or prejudice resulting from the inaccurate SPD was central to the court's holding in *Murphy Oil*.²⁴ While this Note will go into this case more in depth later in this section, footnote one of the *Murphy Oil* opinion provides a clear description of the circuit-split on the issue of inaccurate SPDs. The Fifth Circuit noted that:

[T]here appears to be five-way circuit split regarding whether an ERISA claimant needs to establish reliance and/or prejudice based on the conflicting terms on an SPD. The Third and Sixth Circuits do not require a showing of reliance. . . . The Second Circuit also does not require a showing of reliance, but does require a showing of a likelihood of prejudice, which an employer may then rebut through evidence that the deficient SPD was in effect a harmless error. . . . The Seventh and Eleventh Circuits require a showing of reliance. . . . The First, Fourth, and Tenth Circuits require a showing of reliance or prejudice, though it appears the terms "reliance" and "prejudice" are sometimes treated synonymously. . . . Finally, the Eighth Circuit requires a showing of reliance or prejudice, but only if the SPD is "faulty."²⁵

The confusion caused by these different standards and the ability (or inability) to recover based solely on the jurisdiction where a plaintiff files suit is contradictory to the stated purpose behind ERISA. Some employees enjoy more protection while others do not, solely because an employer does business in one jurisdiction rather than another.²⁶ The protection of employees under a federal statute should not depend solely on jurisdiction in this manner. Therefore, this Note will evaluate the advantages and disadvantages of all five standards employed by the circuits, beginning with the earliest decisions.

First, this Note will discuss the "reliance or prejudice" standard introduced by the First Circuit in 1984.²⁷ Next, the discussion will focus on the "reliance" standard described by the Eleventh Circuit in 1992.²⁸ The discussion will then turn to the "reliance, but only if SPD is faulty" standard set forth by the Eighth Circuit in 1998.²⁹ The fourth standard is the "rebuttable presumption of prejudice," which was introduced in 2003 by the Third Circuit.³⁰ The last standard this Note will examine is the "no reliance" standard. Although first introduced in 1988, the "no reliance" standard has gained acceptance recently in

²² *Murphy Oil*, 497 F.3d at 458.

²³ See generally *id.*

²⁴ *Id.* at 455 (noting the break in employment was caused by an injury, not a decision that could have been influenced or prejudiced by the SPD.).

²⁵ *Id.* at 458 n.1.

²⁶ Joyce, *supra* note 4, at 787-88. Although Joyce frames this discussion as an argument against a "no reliance" standard, he also illustrates the fact that, as with any circuit split, recovery often depends on the jurisdiction in which the suit is brought. See *id.*

²⁷ *Govoni v. Bricklayers, Masons & Plasterers Int'l Union, Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984).

²⁸ *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992).

²⁹ *Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 621 (8th Cir. 1998).

³⁰ *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 113 (2d Cir. 2003).

both the Third and the Fifth Circuits.³¹ One should note that with the passage of time, the circuits have generally moved from the stricter standards of the First and Eleventh Circuits to the more lenient standards of the Second and Fifth Circuits. The United States Supreme Court should follow this trend and adopt the “no reliance” standard adopted most recently by the Fifth Circuit in 2007.

A. *Govoni and the “Reliance or Prejudice” Standard*

The earliest, and perhaps most frequently cited, circuit opinion on the issue of reliance on an inaccurate SPD is *Govoni v. Bricklayers, Masons and Plasterers International Union of America, Local No. 5 Pension Fund*.³² *Govoni* created the rule that was later followed by the Fourth and Tenth Circuits. Specifically, although an SPD may be inaccurate and misleading, in order to recover under the terms of the SPD, a plaintiff must “show some significant reliance upon, or possible prejudice flowing from, the faulty [SPD].”³³ The First Circuit in *Govoni*, and its Fourth and Tenth Circuit counterparts, each provide a unique insight into why these courts require plaintiffs to show either reliance on or prejudice from an inaccurate SPD.³⁴

In *Govoni*, the issue was whether a break in the plaintiff’s employment disqualified him from receiving plan benefits.³⁵ The court’s decision came down to whether the employer’s failure to include the relevant provision regarding breaks in employment in the SPD would allow the plaintiff to recover.³⁶ An important fact in *Govoni* is that the relevant provision took effect *after* the plaintiff’s break in employment.³⁷ In other words, the plan and SPD could not have played a role in the plaintiff’s decision to take a break in employment, because the conflict arose subsequent to the employee’s decision. Unwilling to allow recovery without a showing of causation, the court ruled that a showing of reliance or prejudice was required.³⁸ The court analyzed these issues separately, finding that in this case, the plaintiff had neither relied on, nor was prejudiced by, the faulty SPD.³⁹

In 1993, the Fourth Circuit adopted the *Govoni* rule in *Aiken v. Policy Management Systems Corp.*⁴⁰ In *Aiken*, the plaintiff resigned after sexual har-

³¹ See *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458-59 (5th Cir. 2007); *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 380 (3d Cir. 2003).

³² *Govoni*, 732 F.2d 250.

³³ *Id.* at 252.

³⁴ *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996); *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 141 (4th Cir. 1993).

³⁵ *Govoni*, 732 F.2d at 250-51.

³⁶ *Id.* at 252 (stating that although trustees violated ERISA § 102, the issue of whether *Govoni* could “secure relief” depended on whether the court would accept case law suggesting *Govoni* needed to prove that he relied on the defective SPD).

³⁷ *Id.*

³⁸ *Id.* (“[T]o secure relief, *Govoni* must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description.”).

³⁹ *Id.*

⁴⁰ *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 141 (4th Cir. 1993).

assessment allegations were made against him.⁴¹ The plaintiff, who was under sixty years of age, argued that the SPD's language motivated his decision to resign.⁴² The relevant section of the SPD stated that "if a participant terminates employment after completing 20 years of service but before attaining age 60, the participant is entitled to distribution of the vested interest in the Plan."⁴³

The defendant argued that the SPD was not accurate, and the plan documents required a minimum age of sixty before plan participants would be entitled to a lump sum distribution.⁴⁴ The court, without much discussion, adopted the *Govoni* "reliance or prejudice" rule.⁴⁵ The Fourth Circuit reversed because the district court had combined its discussion of reliance and prejudice together.⁴⁶ The Fourth Circuit explained that there should be two inquiries and if the plaintiff could prove one or the other, he should be entitled to recover.⁴⁷

Finally, in *Chiles v. Ceridian Corp.*,⁴⁸ the Tenth Circuit provided its rationale for adopting the *Govoni* "reliance or prejudice" standard. The issue in *Chiles* was whether the employer was required to make health insurance premium payments for a group of employees under the terms of an inaccurate SPD.⁴⁹ In applying the *Govoni* rule, the court explained that applying "[a]ny other rule would allow a windfall for some employees and unfairly increase cost for employers and their insurers, who rely on the terms of the plan in providing benefits and coverage."⁵⁰ The Tenth Circuit's rationale illustrates why the *Govoni* "reliance or prejudice" standard is wrong. This standard, instead of protecting employees, protects the employers and insurers who drafted the plan documents and the inaccurate SPD by placing the burden of proof on employees.

Although the Tenth Circuit is correct when it states that employers and insurers rely on plan documents, it ignores the fact, recognized by Congress, that employees rely on the SPD.⁵¹ Placing the burden on the employee to prove reliance or prejudice is contrary to Congress' stated intent to "protect . . . the interests of participants in employee benefit plans and their beneficiaries. . . ."⁵² A court should be reluctant to reward plaintiffs with windfalls simply because of a defendant's honest error. However, by requiring a showing of reliance or prejudice, the court is also likely to deny recovery for many employees who genuinely relied on or were genuinely prejudiced by the drafting error, but cannot prove their reliance. Additionally, as discussed in Part IV of this Note, the Tenth Circuit's fear of a windfall for undeserving employees is

⁴¹ *Id.* at 139.

⁴² *Id.* at 140-41.

⁴³ *Id.* at 140.

⁴⁴ *Id.*

⁴⁵ *Id.* at 141 ("We believe that the district court was correct in its decision to apply *Govoni*. . . . We adopt *Govoni*'s disjunctive construction as our own.").

⁴⁶ *Id.* at 142.

⁴⁷ *Id.*

⁴⁸ *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996).

⁴⁹ *Id.* at 1508-09.

⁵⁰ *Id.* at 1519.

⁵¹ See 29 U.S.C. § 1022(a) (2006).

⁵² 29 U.S.C. § 1001(b) (2006).

not an inevitable outcome should a court reject the “reliance or prejudice” standard.

Another problem with the *Govoni* standard is the confusion between reliance and prejudice. Many courts, such as the district court in *Aiken*, have treated these two elements as if they were synonymous.⁵³ This confusion possibly contributed to the creation of the next standard by the Eleventh Circuit.

B. Branch and the “Reliance” Standard

In 1992, the Eleventh Circuit adopted an alternative to the “reliance or prejudice” standard described in *Govoni*, holding that in order to recover on the terms of an inaccurate SPD, a plaintiff “must prove reliance on the summary.”⁵⁴ This standard is stricter than the *Govoni* rule, as it does not allow a plaintiff the option of proving the likelihood of prejudice flowing from the SPD. Instead, only a showing of reliance on the specific disputed terms of the summary is sufficient under this standard.

*Branch v. G. Bernd Co.*⁵⁵ involved an employee who resigned because of the employer’s new drug testing policy.⁵⁶ Before he left, however, he did not complete the necessary forms for continued medical coverage under the Consolidated Omnibus Budget Reconciliation Act (“COBRA”).⁵⁷ Two months later, he was shot several times by an unknown gunman and was admitted to the hospital in a semi-comatose condition.⁵⁸ The dispute focused on the length of time allowed for the employee to sign up for COBRA benefits after resignation.⁵⁹ The district court held that that the plaintiff was not required to show reliance on the terms of the SPD to recover.⁶⁰ The Eleventh Circuit disagreed, reasoning that by not reading the SPD, the plaintiff, and not the employer or the court, thwarted Congress’ intent of having informed employees.⁶¹ Some confusion exists as to whether this “reliance” standard really is a different standard, or just a misinterpretation of *Govoni*.⁶² The reason for this confusion comes from the *Branch* opinion, where the Eleventh Circuit cites *Govoni* and its reli-

⁵³ *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458 n.1 (5th Cir. 2007).

⁵⁴ *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992).

⁵⁵ *Id.* at 1574.

⁵⁶ *Id.* at 1576.

⁵⁷ *Id.* See also 29 U.S.C. §§ 1161-1168 (2006).

⁵⁸ *Branch*, 955 F.2d at 1576.

⁵⁹ *Id.* at 1577-78.

⁶⁰ *Id.* at 1578.

⁶¹ *Id.* at 1579 (“Congress . . . required employers to provide their employees with accurate and understandable summary plan descriptions because it wanted ‘to protect the beneficiaries of benefit plans by insuring that employees are fully and accurately apprised of their rights under the plan.’ . . . [W]hen a beneficiary fails to read or rely on the summary, whether it is accurate or not, the beneficiary . . . prevents full appraisal of the rights under the plan. Beneficiaries must do their part if Congress’ objective is to be met.” (citation omitted)).

⁶² See, e.g., *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458 n.1 (5th Cir. 2007) (classifying *Branch* as a separate standard); *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 380 (3d Cir. 2003) (grouping *Branch* with *Govoni* and *Aiken*).

ance or prejudice standard, but then restates its own standard differently, omitting any mention of prejudice.⁶³

In *Health Cost Controls of Illinois, Inc. v. Washington*,⁶⁴ the Seventh Circuit accepted the Eleventh Circuit's "reliance" standard.⁶⁵ Interestingly, the *Health Cost* court cited *Chiles* and *Aiken* as origins of this rule even though *Chiles* and *Aiken* articulated a "reliance or prejudice" standard.⁶⁶ In *Health Cost*, the plaintiff was injured in a car accident and received payment for medical bills from both the ERISA plan and her personal auto insurance.⁶⁷ According to the plan documents, the plan was entitled to reimbursement if the plan beneficiary received payments from a third party (such as an auto insurer).⁶⁸ However, the plaintiff asserted the SPD could be interpreted to mean the plan was only entitled to reimbursement *if* the plan beneficiary received payment from the third party who had caused the injury, an interpretation which would exclude payments made by the auto insurer.⁶⁹

The issue the court addressed was whether the plan was entitled to payments made by the plan beneficiary's auto insurer.⁷⁰ The Seventh Circuit stated that "[w]hen . . . 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."⁷¹ There is a glaring omission in the Seventh Circuit's opinion of any prejudice analysis. While this prejudice element was so important in the *Govoni*, *Aiken*, and *Chiles* opinions that the courts gave the prejudice element its own separate consideration,⁷² the Eleventh and Seventh Circuits either ignore it or treat it as synonymous with reliance.

If the *Govoni* standard suffers from being too harsh on employees, then this standard, despite the Eleventh Circuit's assertion,⁷³ blatantly disregards Congress' intent of placing the burden of protecting and informing employees on employers and insurers.⁷⁴ This standard, whether intentionally or inadvertently, eliminates the option for plaintiffs to prove prejudice. Instead, it

⁶³ *Branch*, 955 F.2d at 1578. The court first states its interpretation of the rule from *Govoni* as: a plaintiff "must show reliance on the summary," omitting any mention of prejudice. *See id.* However, in its string cite following that rule, the court cites the rule from *Govoni* as: a plaintiff "must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description." *Id.*

⁶⁴ *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703 (7th Cir. 1999).

⁶⁵ *Id.* at 711.

⁶⁶ *Id.* (including *Chiles* and *Aiken* in a string cite following statement that plaintiff cannot recover "unless the plan participant . . . has reasonably relied" with no mention of prejudice).

⁶⁷ *Id.* at 706.

⁶⁸ *Id.* at 711.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 141 (4th Cir. 1993).

⁷³ *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992) ("[W]e do not share the Sixth Circuit's belief that we would undermine Congress' objectives by requiring beneficiaries to prove reliance on inaccurate plan summaries.").

⁷⁴ Although it would be ideal if all employees read each provision of their respective SPDs, Congress has not yet made reading an SPD a requirement to recovery under ERISA. However, Congress has placed a burden on the employer to create an SPD that can be understood by the average plan participant. *See* 29 U.S.C. § 1022(a) (2006).

requires a showing of actual reliance on the specific contradictory terms of the SPD to the plaintiff's detriment.⁷⁵ This standard provides very little protection for employees and therefore does not further the intent of ERISA.

C. *Marolt and the "Reliance But Only if SPD is Faulty" Standard*

The standard set out by the Eighth Circuit best illustrates the confusion among circuits regarding which standard to use and the available standards. The Eighth Circuit held that if an SPD conforms to the formal ERISA requirements, the plaintiff need not show reliance to recover.⁷⁶ However, if the SPD does not conform to the formal requirements of ERISA, the plaintiff must show reliance.⁷⁷ While this standard potentially awards businesses for sloppy drafting and would therefore be contrary to Congress' intent, it nonetheless illustrates the conflict in this area of litigation between contractual and estoppel-like interpretations of ERISA.

In the Eighth Circuit case, *Marolt v. Alliant Techsystems, Inc.*,⁷⁸ an employee sought retirement benefits.⁷⁹ Under the SPD, the employee appeared to have met the minimum service requirement, but under the plan documents, she had not.⁸⁰ The court found for the plaintiff, stating she did not need to show reliance on the SPD because it was not "faulty."⁸¹ However, the court held that if the SPD had been faulty, the plaintiff would have been required to show reliance or prejudice.⁸² The court stated, "to secure relief on the basis of a faulty summary plan description, the claimant must show some significant reliance on, or possible prejudice flowing from the summary."⁸³ While requiring proof of reliance or prejudice when an SPD is faulty sounds identical to the *Govoni* rule, the Eighth Circuit rejected the argument that an SPD that conflicts with plan documents is necessarily faulty.⁸⁴ The court instead defined a faulty SPD as "one that fails to meet 'the requirements of ERISA and its attendant regulations.'"⁸⁵ In other words, a plaintiff must show reliance only if the SPD fails to meet the formal statutory requirements of an SPD, regardless of whether the SPD conflicts with the actual plan documents.

On its face, *Marolt* looks like a misreading of *Govoni*; however, the Eighth Circuit upheld the *Marolt* decision one year later in *Palmisano v. Allina Health Systems, Inc.*⁸⁶ *Palmisano* involved a terminated employee seeking

⁷⁵ *Health Cost*, 187 F.3d at 711.

⁷⁶ *Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 621 (8th Cir. 1998) (stating plaintiff was not required to show reliance and that an inaccurate SPD does not mean it is faulty).

⁷⁷ *Id.* ("[T]o secure relief on the basis of a *faulty* summary plan description, the claimant must show some significant reliance on, or possible prejudice flowing from the summary." (quoting *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 984 (8th Cir. 1992))) (emphasis added).

⁷⁸ *Marolt*, 146 F.3d 617.

⁷⁹ *Id.* at 618.

⁸⁰ *Id.* at 619.

⁸¹ *Id.* at 621.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* (quoting *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 984 (8th Cir. 1992)).

⁸⁶ *Palmisano v. Allina Health Sys., Inc.*, 190 F.3d 881, 887 (8th Cir. 1999).

executive severance benefits.⁸⁷ The plaintiff sought to take advantage of a favorable passage in a booklet that he argued constituted a faulty SPD.⁸⁸ The plaintiff argued that the faulty SPD should govern and that he should not be required to show reliance on the favorable passage.⁸⁹ However, the Eighth Circuit confirmed the rule from *Marolt* that if an SPD is *valid*, the plaintiff need not show reliance, but if an SPD is *faulty*, a plaintiff must show reliance or prejudice.⁹⁰ The Eighth Circuit explained reliance was only required when an SPD did not conform to the formal requirements of ERISA for two reasons.⁹¹ First, the court explained that where the SPD is faulty, a plaintiff would not be justified in believing it was an SPD and relying on it as such.⁹² Second, the court stated that “[i]f 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.”⁹³

After explaining why faulty SPDs are not legally enforceable and therefore only protect employees when reliance or prejudice is shown, the Eighth Circuit addressed the issue of contractual and estoppel-like approaches to enforcing the terms of SPDs.⁹⁴ On the one hand, the court borrowed from the contract theory-like majority rule that the terms of an SPD govern when they conflict with the terms of the plan documents.⁹⁵ On the other hand, the court also acknowledged this approach fails where an SPD is statutorily deficient because a document that does not meet the formal requirements of an SPD, unlike a contract, does not confer enforceable rights.⁹⁶ In other words, where an SPD creates enforceable rights, it is like a contract and no reliance is required to enforce its terms. However, where the SPD creates no enforceable rights, a plaintiff would have to show reliance as if he were proving an estoppel claim.

The Eighth Circuit is correct in taking the burden off an employee where an employer has been sloppy in its drafting of an SPD, creating conflicts between the SPD and the plan documents. However, under the Eighth Circuit’s standard, an employer benefits by drafting a document that does not meet the formal requirements of ERISA.⁹⁷ This standard works well in some cases, such as *Palmisano*, where a plaintiff desires to recover under a document not

⁸⁷ *Id.* at 884.

⁸⁸ *Id.* at 887.

⁸⁹ *Id.* at 888.

⁹⁰ *Id.* at 887-88.

⁹¹ *Id.* at 888-89.

⁹² *Id.* at 888 (“The Plan book’s severance summary was hopelessly inadequate as an SPD It contained only one piece of information required by ERISA, a *mistaken* description The Plan Book directed Palmisano to an ‘enclosed description,’ a document which he never received The summary provided was so thoroughly lacking in the required detail that it cannot be deemed even a faulty SPD.”)

⁹³ *Id.* (emphasis added).

⁹⁴ While the previous quotation refers to non-SPD documents, it points out that SPDs can “confer benefits.” This language sounds similar to the contractual-like analysis used by the courts to decide that SPDs control when in conflict with plan documents.

⁹⁵ *See id.*; *see also* Valenza, *supra* note 18, at 361-62.

⁹⁶ *Palmisano*, 190 F.3d at 888-89.

⁹⁷ *See id.*

intended to serve as an SPD. However, one can imagine an SPD distributed to employees and intended to serve as an SPD, but because of a formal deficiency would not be enforceable under the Eighth Circuit's rule. In these situations, the employee is punished with an increased burden of proof because the employer, whether intentionally or not, failed to comply with a formal requirement. Even where SPDs do meet all formal requirements, the Eighth Circuit's rule creates a counter-intuitive incentive for employers to argue that the disputed SPD never met the statutory requirements in the first place. Rewarding an employer for creating a faulty SPD by increasing a plaintiff's burden of proof *protects employers* who failed to meet ERISA requirements.

D. *Kodak and the "Rebuttable Presumption of Prejudice" Standard*

In *Burke v. Kodak Retirement Income Plan*,⁹⁸ the Second Circuit stated it was adopting a prejudice standard.⁹⁹ The court moved away from the reliance and prejudice standards set out by circuits before it, and developed a more employee-friendly standard.¹⁰⁰ The Second Circuit requires only a showing that the plaintiff "was *likely* to have been harmed as a result of a deficient SPD."¹⁰¹

The issue in *Burke* was whether the plaintiff was entitled to survivor benefits under her domestic partner's benefits plan.¹⁰² The plaintiff argued that because the SPD clearly required affidavits for most benefits, but not for survivor income benefits, she was entitled to the survivor income benefits without filing an affidavit.¹⁰³ The defendant argued that the plan documents required an affidavit to receive survivor income benefits.¹⁰⁴ When choosing between the different standards to adopt for resolution of this issue, the Second Circuit rejected the idea that a plaintiff must show detrimental reliance.¹⁰⁵ The court stated that:

'[a] rule requiring . . . detrimental reliance . . . imposes an insurmountable hardship on many plaintiffs,' especially on the estate of a deceased participant, and '[s]uch a rule hardly advances the Congressional purpose of protecting the beneficiaries of ERISA plans by insuring that employees are fully and accurately apprised of their rights under the plan.'¹⁰⁶

The court recognized that employees may learn of benefits from other employees, the employer, a union, or other source and not from the SPD itself.¹⁰⁷ Because employees often learn of benefits from sources other than the SPD, employees would be prejudiced and should be entitled to recovery even

⁹⁸ *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103 (2d Cir. 2003).

⁹⁹ *Id.* at 112-13.

¹⁰⁰ *See generally* Valenza, *supra* note 18, at 392-93.

¹⁰¹ *Burke*, 336 F.3d at 113.

¹⁰² *Id.* at 105-06.

¹⁰³ *Id.* at 106-07.

¹⁰⁴ *Id.* at 107.

¹⁰⁵ *Id.* at 112.

¹⁰⁶ *Id.* (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)) (alteration in original).

¹⁰⁷ *Id.* at 113.

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though they had never read the SPD.¹⁰⁸ The court found that “[t]he result is a presumption of prejudice in favor of the plan participant after an initial showing that he was likely to have been harmed. . . . ‘[D]efendants could have rebutted this presumption by showing, *inter alia*, that plaintiffs were aware of the Plan’s [requirements].’”¹⁰⁹

The *Kodak* court gets closer to Congress’ intent in protecting employees by essentially presuming prejudice, and allowing the employer to rebut that presumption. While this standard is more beneficial to the employee, it still is not protective enough. In addition, the standard complicates litigation even further by allowing rebuttal. First, while this standard is not as strict as the reliance standards, the *Kodak* standard still requires plaintiffs to prove some level of prejudice. While courts may not feel sympathetic towards plaintiffs that cannot meet such a low level of proof, they should remember the following: one, the employer could have avoided the problem with minimal effort by simply proof-reading and editing its SPD; two, employees usually have less resources than employers or plan providers to engage in intensive litigation; and three, Congress’ intent in enacting ERISA was primarily to protect employees.¹¹⁰ This standard will increase discovery costs and complicate litigation as the employer is in the worst position to prove whether an employee was likely prejudiced by a defective SPD.

E. Burstein and the “No Reliance” Standard

Four years after *Govino*, the Sixth Circuit had an opportunity to address the issue of reliance on inaccurate SPDs in *Edwards v. State Farm Mutual Automobile Insurance Co.*¹¹¹ In *Edwards*, the plaintiff was seeking disability benefits after becoming totally disabled following surgical removal of a benign brain tumor, but the defendant argued the plaintiff did not meet the minimum service requirement.¹¹² Under the SPD, he would have met the requirement, but under the plan documents, he did not.¹¹³ The Sixth Circuit stated that “existing precedent does not dictate that a claimant who has been misled by summary descriptions must prove detrimental reliance. Congress has promulgated clear directives prohibiting misleading summary descriptions. This court elects not to undermine the legislative command by imposing technical requirements upon the employee.”¹¹⁴ Although this language is dicta because the plaintiff in *Edwards* had in fact relied to his detriment on the inaccurate SPD,¹¹⁵ two other circuits have accepted this “no reliance” standard.¹¹⁶ In

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 113-14 (quoting *Manginaro v. Welfare Fund of Local 771*, 21 F. Supp. 2d 284, 297 n.7 (S.D.N.Y. 1998)).

¹¹⁰ 29 U.S.C. § 1001(b) (2006).

¹¹¹ *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134 (6th Cir. 1988).

¹¹² *Id.* at 135, 137.

¹¹³ *Id.*

¹¹⁴ *Id.* at 137.

¹¹⁵ *Id.*

¹¹⁶ See *infra* notes 118-37 and accompanying text.

addition, other courts accepting a reliance-based standard have had to refute the reasoning behind it.¹¹⁷

Although *Edwards* was first in time, the Third Circuit was the first court to actually include the “no reliance” standard as part of its holding in *Burstein v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation*.¹¹⁸ In *Burstein*, the plaintiffs tried to recover benefits through a retirement plan that had terminated.¹¹⁹ According to the SPD, upon termination of the plan, individuals automatically became vested regardless of years of service.¹²⁰ However, the actual plan qualified the SPD by providing that beneficiaries would only receive those benefits that accrued as of the termination date.¹²¹ The court first held that the terms of the SPD controlled.¹²² The court then found that the plaintiffs did not need to prove reliance on the SPD, holding that “[c]laims for ERISA plan benefits . . . are contractual in nature . . . [and] the SPD serves as a summary of the contract’s (i.e., the plan document’s) key terms.”¹²³ Furthermore, the court decided, as in contract law, the plan itself should be interpreted to include the terms of the summary, and to the extent the plan was modified by the SPD, the SPD should control.¹²⁴ Finally, the court stated:

[J]ust as a court’s enforcement of a contract generally does not require proof that the parties to the contract actually read, and therefore relied upon, the particular terms of the contract, we are persuaded that enforcement of an SPD’s terms under a claim for plan benefits *does not* require a showing of reliance.¹²⁵

Finally, in the most recent SPD case, *Washington v. Murphy Oil USA, Inc.*,¹²⁶ an employee was injured on the job after nearly nine years of employment.¹²⁷ As a result of the injury, the employee was unable to return to his job.¹²⁸ The plan documents required an employee to complete ten years of employment to be eligible to receive benefits.¹²⁹ Therefore under the plan itself, the employee was ineligible for benefits.¹³⁰ However, the SPD required only five years of service for the employee’s interest to vest.¹³¹ The Fifth Circuit first decided that the provisions of the SPD governed.¹³² The court then addressed the issue of whether the employee should be required to show reli-

¹¹⁷ See, e.g., *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992).

¹¹⁸ *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365 (3d Cir. 2003).

¹¹⁹ *Id.* at 371.

¹²⁰ *Id.* at 375.

¹²¹ *Id.* at 375-76.

¹²² *Id.* at 378.

¹²³ *Id.* at 380-81 (citations omitted).

¹²⁴ *Id.* at 381.

¹²⁵ *Id.*

¹²⁶ *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453 (5th Cir. 2007).

¹²⁷ *Id.* at 455.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 457 (“Because the terms of the SPD and the Plan conflict, the terms of the SPD control and are binding on Murphy.”).

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ance on the SPD in order to recover.¹³³ This question was critical to the outcome in *Murphy Oil*, because the plaintiff's break in employment was due to an on-the-job injury and not a personal choice.¹³⁴ Therefore, plaintiff could not have relied on the SPD, and his claim would fail if the court required a showing of reliance.

The Fifth Circuit ruled that reliance was not required.¹³⁵ The court reasoned that:

[T]his approach is most consistent with ERISA, which is designed to protect employees; and most consistent with our opinion in *Hansen*,¹³⁶ which refused to place the burden of conflicting SPDs on plan beneficiaries. . . . [A]s a matter of contract law [the plaintiff's] right to disability benefits vested and it cannot be taken away.¹³⁷

The "no reliance" standard is the next logical step after a court has determined that the terms of the SPD govern over the conflicting terms of the plan documents. Determining that the terms of the SPD control over the terms of the plan documents follows from the intent behind ERISA to protect employees.¹³⁸ Allowing the SPD to govern also stems from the idea that ERISA plans are contracts between the employer and the employee with the SPD serving as a summary of the contract terms.¹³⁹ For these reasons, all courts deciding SPD cases should adopt the "no reliance" standard.

As the Third Circuit explained in *Burstein*, in contract law the courts are not concerned with whether the parties read the contract.¹⁴⁰ Courts are especially unconcerned when the party looking to enforce the contract was not in a position to negotiate the terms of the contract.¹⁴¹ Cases involving SPDs are not like cases involving a contract of adhesion where a sophisticated party attempts to enforce non-negotiated terms against a less sophisticated party. Instead, these SPD cases usually involve an unsophisticated party who desires to hold a sophisticated party to the terms of a contract the sophisticated party itself drafted. This standard is the most appropriate standard when considering the circumstances of these cases and the intent behind ERISA.

IV. THE SUPREME COURT SHOULD ADOPT THE "NO RELIANCE" STANDARD

Since the First Circuit decided *Govoni* in 1984, the circuits have slowly moved away from the "reliance or prejudice" standard.¹⁴² One reason some circuits have declined to follow *Govoni* is that the "reliance or prejudice" stan-

¹³³ *Id.* at 457-58.

¹³⁴ *Id.* at 455.

¹³⁵ *Id.* at 458-59 ("Accordingly, we hold that when the terms of an SPD and an ERISA plan conflict and the terms of the conflicting SPD unequivocally grant the employee with a vested right to benefits, the employee need not show reliance or prejudice.")

¹³⁶ *Hansen v. Cont'l Ins. Co.*, 940 F.2d 971 (5th Cir. 1991).

¹³⁷ *Murphy Oil*, 497 F.3d at 459.

¹³⁸ *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 378-79 (3d Cir. 2003).

¹³⁹ *Murphy Oil*, 497 F.3d at 458-59.

¹⁴⁰ *Burstein*, 334 F.3d at 381.

¹⁴¹ *See* *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 113 (2d Cir. 2003).

¹⁴² *See supra* Part III.

standard does not reflect Congress' intent in enacting ERISA.¹⁴³ Additionally, an estoppel-like requirement of reliance is contrary to the contractual nature bestowed on ERISA plans¹⁴⁴ when a court decides that the terms of an SPD govern over the terms of conflicting plan documents.¹⁴⁵ In contrast, a "no reliance" standard holds employers responsible for the documents they create and will promote more careful drafting of these documents.¹⁴⁶ Contrary to some assertions, a "no reliance" standard will not create a multitude of unfair windfalls, will not necessarily increase litigation, and is not contrary to the intent behind ERISA legislation.

A. *There are Many Reasons to Adopt a "No Reliance" Standard*

1. *A "No Reliance" Standard is Consistent with Congress' Expressed Intent in Enacting ERISA*

Nearly all circuits agree that the main purpose behind ERISA is to protect employees.¹⁴⁷ Even the Eleventh Circuit in *Branch*, while arguably adopting the strictest standard of all the circuits, acknowledged that Congress wanted "to protect the beneficiaries of benefit plans by insuring that employees are fully and accurately apprised of their rights under the plan."¹⁴⁸ A similar goal of Congress in enacting ERISA was "to protect . . . the interests of participants in employee benefit plans . . . by requiring the disclosure and reporting to participants . . . of financial and other information . . . by establishing standards of conduct . . . and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."¹⁴⁹

Plan participant protection is an important theme in ERISA legislation, and the "no reliance" standard best matches this intent by refusing to place the burden of proof on employees. The court in *Branch* complains that employees who do not read the SPD are not "do[ing] their part" to further Congress' intent that they stay well-informed.¹⁵⁰ However, no language in the ERISA statute implies that Congress was concerned with employees who failed to study their respective SPDs. The only intent language in the ERISA statute describes Congress' concern with employers' efforts to inform employees through the SPD and holding employers responsible for their failure to do so.¹⁵¹ If the employer never produces an accurate SPD, the employee who has read the inaccurate SPD is just as informed about the actual plan's provisions as the employee who never read the SPD.

Furthermore, Congress intended to provide for appropriate remedies and sanctions,¹⁵² both of which a "no reliance" standard promotes. A "no reliance"

¹⁴³ See *supra* Part III.

¹⁴⁴ *Burstein*, 334 F.3d at 381.

¹⁴⁵ Valenza, *supra* note 18, at 367.

¹⁴⁶ *Hansen v. Cont'l Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991).

¹⁴⁷ This is reflected in the fact that nearly every circuit has decided that SPDs control in the event of conflict with plans. See *supra* note 18 and accompanying text.

¹⁴⁸ *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992) (emphasis added).

¹⁴⁹ 29 U.S.C. § 1001(b) (2006) (emphasis added).

¹⁵⁰ *Branch*, 955 F.2d at 1579.

¹⁵¹ 29 U.S.C. § 1001(b).

¹⁵² *Id.*

standard allows remedies for an employee who has been injured under the terms of a poorly-drafted SPD even though the employee may be unable to prove actual reliance on a specific term.¹⁵³ A “no reliance” standard also furthers Congress’ intent to provide for sanctions. While the quoted statute refers to statutory sanctions, the statutory language demonstrates an intent to punish irresponsible employers to the benefit of employees (whether or not he relied on the SPD). Between an irresponsible employer and a lazy employee, ERISA sides with the employee, and court decisions should reflect that intent, even if doing so has the effect of “sanctioning” the employer.

2. The General Rule that an SPD Governs Between Conflicting Plan Documents is Inconsistent with Also Requiring a Showing of Reliance

Next, as evidenced by the Eighth Circuit opinions, there is a conflict between the contract-like analysis the reliance and prejudice circuits begin using in SPD cases and the estoppel-like analysis with which they end.¹⁵⁴ The circuits begin by using a contract-like theory to find that an SPD controls over the conflicting terms found in plan documents, similar to a summary section of a contract.¹⁵⁵ However, the courts then engage in an estoppel-like analysis to find that the SPD only allows recovery if reliance is shown.¹⁵⁶ This begs the question: why determine that an SPD governs in the first place if the court is going to require proof of reliance later? To be consistent, courts should use one of the following two approaches:

- 1) the SPD is not contractual in nature, does not in itself confer any rights on the beneficiary, and therefore does not govern unless the elements of estoppel can be proven (similar to the Eighth Circuit’s standard when an SPD is “faulty”); or
- 2) the SPD is contractual in nature, and therefore does create enforceable rights.

The Supreme Court should reject any approach that states an SPD governs over plan documents but then retracts that protection if the plaintiff cannot show reliance; such a position is internally inconsistent.

3. Employers Should be Held Responsible for the Documents They Create

Another reason a “no reliance” standard is appropriate is that the employer is responsible for creating plan documents and the SPD; therefore, the employer should be responsible for errors in those documents. ERISA imposes

¹⁵³ It should be noted that proving reliance is not always easy because of the subjective nature of reliance. Therefore, just because an employee would be unable to prove reliance does not necessarily mean he did not rely. The idea behind the “presumption of prejudice” and the “no reliance” standards is that, because of the intent behind ERISA, the employee should not have this burden.

¹⁵⁴ See *supra* notes 94-97 and accompanying text.

¹⁵⁵ See *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 378 n.18 (3d Cir. 2003).

¹⁵⁶ *Palmisano v. Allina Health Sys., Inc.*, 190 F.3d 881, 888 (8th Cir. 1999).

an affirmative obligation to create documents complying with the statute.¹⁵⁷ A “no reliance” standard simply places the burden where it belongs: with the employer creating the document.¹⁵⁸ All an employer needs to do to avoid litigation and liability in conflicting SPD cases is create an SPD consistent with the terms of the plan documents.¹⁵⁹

“Reliance” standards unfairly shift the burden from the employers to employees, who enjoy no influence in the drafting of the plan documents or SPDs.¹⁶⁰ In contract law, courts construe ambiguities against the drafter¹⁶¹ and parties can be bound by contracts they have not read.¹⁶² Courts should similarly hold employers who draft inaccurate SPDs responsible for their sloppy drafting regardless of whether the employees read or were unfairly burdened by the defective SPD.¹⁶³ While binding employers to documents they create may arguably create a windfall for some employees, the intent behind ERISA is to both inform and provide remedies for employees.¹⁶⁴ There is no expressed intent in the ERISA statute to protect employers from their own mistakes.

4. The “No Reliance” Standard Will Create an Incentive for Employers to Carefully Draft Accurate Plan Documents and SPDs

Related to the concept that employers should be responsible for the documents they create is that the strict liability nature of a “no reliance” standard will create an incentive for careful drafting that is absent in the other standards. There is no doubt that a “no reliance” standard is the easiest burden of proof for a plaintiff to meet. Consequently, an employer that creates a conflicting SPD will be open to more liability than under the other standards. The employer’s cost/benefit analysis will change when drafting SPDs and plan documents because of this possibility of increased liability.

Employers who previously viewed the likelihood of litigation arising from an SPD as small, and therefore invested little in drafting the SPD, may now see more benefit from a larger investment. This extra investment pays benefits both to the employer and the employee. The employer will have more confidence that the chances of SPD-related litigation will decrease. In addition, the improved SPDs and plan documents will greatly benefit employees who can be confident that their SPD accurately reflects the plan documents. Finally, the more accurate documents will better embrace the intent behind ERISA of creating informed employees.

¹⁵⁷ 29 U.S.C. § 1001(b).

¹⁵⁸ *Hansen v. Cont’l Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991).

¹⁵⁹ This is obviously easier said than done considering the complexity of many of these plans. Nevertheless, employers are the only party with control over the creation of these documents and should be held responsible as such.

¹⁶⁰ *Hansen*, 940 F.2d at 982.

¹⁶¹ *United States v. Seckinger*, 397 U.S. 203, 210 (1970) (“[Supreme Court was] guided by the general principles that have evolved concerning the interpretation of contractual provisions Among these principles is the general maxim that a contract should be construed most strongly against the drafter.”).

¹⁶² *See, e.g., Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 381 (3d Cir. 2003).

¹⁶³ *Id.*

¹⁶⁴ *See* 29 U.S.C. § 1001(b) (2006).

B. Arguments Against a “No Reliance” Standard are Flawed

1. A “No Reliance” Standard Does Not Create an Automatic Windfall for Employees Covered under a Plan with a Conflicting SPD

The most popular argument against the “no reliance” standard is supplied by the Tenth Circuit in *Chiles v. Ceridian Corp.*¹⁶⁵ There, the court argued that if the plaintiff is not required to show reliance, employees might receive an unfair windfall to the detriment of the plan and other employees depending on the plan’s funding.¹⁶⁶ The Tenth Circuit stated that adoption of a “no reliance” standard “would allow a windfall for some employees and unfairly increase costs for employers and their insurers, who rely on the terms of the plan in providing benefits and coverage. This in turn could jeopardize the solvency of the plan with respect to the remaining employees.”¹⁶⁷

The first counterargument to this view is that courts should not concern themselves with any added expense to employers, because the employer could have avoided the problem by being more careful in drafting the SPD.¹⁶⁸ There is, however, a legitimate concern that windfalls to numerous employees will negatively affect the interests of other plan beneficiaries.¹⁶⁹ It is therefore important to look closely at the possibility that windfalls will occur. First, despite the Tenth Circuit’s ominous language, the “no reliance” standard does not allow for automatic awards given to every employee subject to a defective SPD.¹⁷⁰ Although the “no liability” standard looks like a strict liability rule, a plaintiff must still show an injury and the extent of the injury to recover damages. Plaintiffs will only receive damages in the amount of that injury. Despite these concerns regarding windfalls, minor conflicts between SPDs and plan documents simply will not give rise to multi-million dollar judgments for every employee subject to the conflicting SPD. Additionally, the fact that the plaintiff was not aware of the cause of the injury or the injury itself when it occurred does not mean there is no injury and that any subsequent recovery is a windfall. If this were the rule, no cause of action involving an initially ignorant plaintiff, such as fraud, would ever survive.

Secondly, in all of the conflicting SPD cases, at some point the employee consulted and relied on the SPD, even when the court says he or she has not. For example, assume an employee was discharged after seventeen years of service. Before his discharge, he never consulted the plan’s SPD. According to plan documents, twenty years of service were required to receive retirement benefits and the employer declines to pay the benefits. The employee, feeling he deserves retirement benefits, consults the only document he has immediate access to: the SPD. The SPD states that employees are entitled to retirement benefits after fifteen years of service. The employee brings this to the

¹⁶⁵ *Chiles v. Ceridian Corp.*, 95 F.3d 1505 (10th Cir. 1996).

¹⁶⁶ *Id.* at 1519.

¹⁶⁷ *Id.*

¹⁶⁸ Valenza, *supra* note 18, at 393.

¹⁶⁹ Michael Cavadel, *Burke v. Kodak and the SPD Circuit Split*, 7 U. PA. J. LAB. & EMP. L. 139, 153 (2004).

¹⁷⁰ *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 459 n.2 (5th Cir. 2007) (noting that “[o]ur holding today is limited to situations in which the conflicting terms of an SPD unequivocally grant the employee with a vested right to benefits.”).

employer's attention, and the employer denies the employee's claim, stating that the plan documents govern. The employee promptly consults an attorney, and files suit.

Jurisdictions applying the "reliance" standard are not likely to find for the plaintiff because the plaintiff could not have relied on the SPD, having never consulted the SPD prior to his discharge. However, as in all of the conflicting SPD cases that come before the courts, at least two instances of reliance occur with our hypothetical employee. First, the employee would have to know enough about the plan, from coworkers and supervisors, to know he should consult the SPD in the first place. The coworkers' and supervisors' knowledge presumably came from the SPD. This reasoning is what the Second Circuit alluded to with its "presumption of prejudice" standard.¹⁷¹ Second, the decision to consult an attorney and bring a lawsuit derives from the reasonable reliance that the plaintiff has an enforceable right under the SPD. Because an SPD must have been relied on in at least these instances in order for a suit to get to litigation in the first place, the court should be less concerned with an employee's windfall than an employer's poor drafting.

Finally, the courts have created this "problem" of windfall by establishing the rule that the terms of the SPD should govern over the conflicting terms of the plan documents. By stating that the SPD governs, the courts have essentially created enforceable contract rights in the SPD and the plaintiff is receiving a windfall because he is recovering on enforceable rights the court created in an SPD. Courts truly concerned with windfalls should analyze SPDs on a case-by-case basis to decide whether allowing the SPD to govern would create a windfall for that particular plaintiff.

2. *Applying the "No Reliance" Standard Will Not Increase Litigation*

Another argument against the "no reliance" standard is that allowing plaintiffs to make a claim without proving reliance would open the doors to increased litigation.¹⁷² Under the "no reliance" standard, employees who did not rely on the conflicting terms of an SPD are able to bring a successful claim against an employer. If this happens, employers, plans, and plan beneficiaries may feel the effects of the plan's increased litigation costs since those costs are presumably being taken from the plan and therefore being paid by other plan participants.¹⁷³ Similar to the argument that a "no reliance" standard will create windfalls for "undeserving" employees at the expense of other plan beneficiaries, opponents of the "no reliance" standard argue that increased litigation and litigation costs will likewise negatively affect other plan beneficiaries.¹⁷⁴ While resulting increased litigation costs are an important concern, this argument is unfounded because the "no reliance" standard will not necessarily increase litigation.

¹⁷¹ *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 113 (2d Cir. 2003).

¹⁷² Cavadel, *supra* note 169, at 153.

¹⁷³ *Id.* ("[T]he *Burstein* standard could cause more harm than good by forcing employee plan participants to pay for the costs of the increased liability that plan administrators may face.").

¹⁷⁴ *Id.*

If the Supreme Court were to adopt the “no reliance” standard, two factors would decrease SPD litigation costs. First, there would be a consistent, intelligible rule in place. Employers with employees in multiple jurisdictions will have certainty as to which standard applies and research costs would decrease. However, this result would occur regardless of which standard the Supreme Court adopts for uniformity in addressing this issue. More importantly, and as discussed above, a standard that places the burden on employers would give employers an incentive to be more careful in drafting SPDs and plan documents. While the short-term legal costs may rise as more time is spent creating the documents, long-term litigation costs would fall as fewer and fewer conflicts arise between plan documents and SPDs.

Even if more suits are brought because of the easier burden on the plaintiff, the “no reliance” standard eliminates the extremely subjective issues of reliance and probability of prejudice. “One might assume that if neither reliance nor prejudice were required, more claims could be decided pretrial, thus saving the parties from an expensive and time-consuming trial.”¹⁷⁵ Besides potentially simplifying SPD litigation, eliminating the subjective issue of reliance also eliminates the concern that courts can substitute their judgment as to whether an employee relied on the SPD.¹⁷⁶

The practical difference between the “no reliance” standard and the Second Circuit’s “rebuttable presumption of prejudice” standard might be best illustrated by litigation costs. The Second Circuit’s standard not only requires proof of likelihood of harm, it then allows the employer to rebut that evidence, increasing litigation costs even more.¹⁷⁷ Although on its surface, placing the burden of proof on the employer is consistent with the intent of ERISA, this standard severely increases discovery and litigation costs to the detriment of other plan beneficiaries.¹⁷⁸ Not only does the Second Circuit’s standard maintain the subjective standards of reliance and prejudice, it requires the employer, who is in the worst position to prove reliance or prejudice, to prove a negative, i.e. there was no reliance.

3. *The “No Reliance” Standard’s Contractual Basis is Not Contrary to Congress’ Intent in Enacting ERISA*

The final argument against a “no reliance” standard is that it rests on contract law, the application of which is unsupported by statute.¹⁷⁹ Although the ERISA statute provides no explicit support for a contract-type analysis, legislative intent supports protecting employees.¹⁸⁰ The contract theory is consistent with Congress’ intent by placing responsibility on employers. Further, as this Note has shown, the case law illustrates that the circuits have interpreted

¹⁷⁵ Valenza, *supra* note 18, at 392.

¹⁷⁶ *Id.* at 393.

¹⁷⁷ *Id.* at 392.

¹⁷⁸ *Id.*

¹⁷⁹ Joyce, *supra* note 4, at 786-87.

¹⁸⁰ *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 380-81 (3d Cir. 2003).

ERISA with reference to at least some contractual concepts when deciding whether the SPD or plan documents should govern a dispute.¹⁸¹

A problem that arises with a contractual interpretation is that if we allow contract law to guide these SPD decisions, the entire SPD should control—not just the conflicting terms.¹⁸² This interpretation is relevant because many SPDs contain a disclaimer providing that the plan documents govern in the event of conflict, and not the SPD.¹⁸³ The Eleventh Circuit has held that upholding these disclaimers would be unfair.¹⁸⁴ The Third Circuit, in *Burstein*, looked at the facts surrounding the SPD and the disclaimer contained therein,¹⁸⁵ and decided that the SPD controlled, in part because plan documents were not readily accessible.¹⁸⁶ The Third Circuit approaches a suitable middle ground. Instead of flatly stating that in every situation the SPD will control, the rule should be that the court can make a limited inquiry into whether, under the circumstances, it is reasonable to give effect to a disclaimer. However, where the SPD is effectively the only document available to an employee, and giving effect to the plan documents would be unreasonable, the SPD should govern and the employee should not have to show reliance on it to recover.

V. CONCLUSION

Due to the wide disagreement among the circuits on the issue of the correct standard of reliance required for recovery on an inaccurate SPD, and the wide range of relief afforded to employees depending on the jurisdiction, the Supreme Court should address the issue of conflicting SPDs and plan documents. In order to remain true to legislative intent and obtain a result that is fair to both employees and employers, the Supreme Court should adopt the “no reliance” rule from *Burstein*, *Edwards*, and *Murphy Oil*.¹⁸⁷

¹⁸¹ See *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458-59 (5th Cir. 2007); *Burstein*, 334 F.3d at 381-82.

¹⁸² *Joyce*, *supra* note 4, at 787.

¹⁸³ See, e.g., *Burstein*, 334 F.3d at 379 (noting the front page of SPD provided that the “[P]lan [D]ocument always governs”).

¹⁸⁴ *McKnight v. S. Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985).

¹⁸⁵ *Burstein*, 334 F.3d at 379.

¹⁸⁶ *Id.* (“The relative inaccessibility of [employer’s] Plan Document serves to highlight that, as Congress intended, the SPD is the primary document on which plan participants must rely.”).

¹⁸⁷ As with any rule, circumstances may require some exceptions to the rule. While these exceptions are not the focus of this Note, this Note has suggested some, such as in the case of a reasonable disclaimer or a statutorily deficient SPD.