BURKE V. KODAK AND THE SPD CIRCUIT SPLIT

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On January 12, 2004, the United States Supreme Court denied a petition for writ of certiorari filed in *Burke v. Kodak Retirement Income Plan.*[1] In its refusal to revisit the Second Circuit's decision, the Court left the fate of millions of employees, as well as a three-way circuit split, unresolved. While this outcome may be viewed as unfortunate, it certainly was not unexpected, as the issue of the appropriate standard for recovery under a deficient summary plan description ("SPD") has puzzled courts for nearly two decades.[2] The result has been a patchwork of legal authority, in which the ability of a plaintiff to recover equitable relief does not depend upon the strength of his case, but rather upon the jurisdiction in which he brings suit. In this Comment, I will demonstrate how the statutory definition of a summary plan description has led to the current confusion regarding what constitutes a deficient summary plan description. Furthermore, I will examine the legal theories behind the three-way circuit split over the proper standard of recovery under a deficient summary plan description. Finally, I will give my own recommendations on which standard should be universally adopted.

I. BACKGROUND INFORMATION

A. Summary Plan Descriptions under ERISA

As their name implies, summary plan descriptions are documents outlining the coverage provided by employee benefits plans. Following the enactment of the Employment Retirement Income Security Act of 1974 ("ERISA"), SPDs have become the keystone of ERISA's disclosure requirements.[3] Currently, millions of employee benefits plan participants and their beneficiaries depend upon SPDs to remain informed of updates in their benefits plans. However, despite their importance, SPDs remain

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1. 336 F.3d 103 (2d Cir. 2003) *cert. denied*, 124 S. Ct. 1046 (2004).

2. One of the first cases to tackle the issue of the appropriate standard for recovery under a deficient SPD was *Govoni v. Bricklayers, Masons and Plasterers Int'l Union, Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984).

3. 60A AM. JUR. 2D *Pensions and Retirement Funds* § 783 (2003).

steeped in controversy, and this debate has arguably undermined the role that Congress originally envisioned for them.

Much of the confusion surrounding SPDs can be traced back to Congress's definition of summary plan descriptions in ERISA, or more appropriately, the lack thereof. Unlike numerous other essential terms,[4] there is no explicit definition for the phrase "summary plan description" in ERISA. Instead, Congress outlined several categories of information that could be included in a proper SPD:

> (1) the name and type of administration of the plan; (2) the name and address of the person designated as agent for the service of legal process; (3) the name and address of the administrator; (4) the names, titles and addresses of any trustee or trustees; (5) a description of the relevant provisions of any applicable collective bargaining agreement; (6) the plan's requirements respecting eligibility for participation and benefits; (7) a description of the provisions providing for non-forfeitable pension benefits; (8) the circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; (9) the source of financing of the plan and the identity of any organization through which benefits are provided; (10) the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; (11) the procedures to be followed in presenting claims for benefits under the plan; and (12) the remedies available under the plan for redress or claims which are denied.[5]

These guidelines, as well as the corresponding administrative regulations instituted by the Department of Labor ("DOL") in 29 C.F.R. § 2520.102-3, only created more questions than they did answers. For example, did Congress intend for plan documents that contain eleven of the twelve categories to be considered SPDs? What about documents that contain eight of the categories? Should plan documents stating to be an SPD, yet lacking several categories of information, still be classified as an SPD? In adopting guidelines, rather than a uniform definition for SPDs, Congress shifted the burden to the courts to answer these questions. As a result, two competing and different theories have emerged for identifying SPDs under

4. *See, e.g.*, 29 U.S.C. § 1002 (2000) (defining "employee welfare benefit plan" and "employee pension benefit plan"); 29 U.S.C. § 1167 (2000) (defining "group health plan"); 29 U.S.C. § 1101 (2000) (defining "insurer" and "guaranteed benefit policy"); *see also* 60A AM. JUR. 2D *Pensions and Retirement Funds* § 783 (2003).

5. Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310, 1316 (3d Cir. 1991) (summarizing 29 U.S.C. § 1022(b) (1974)).

ERISA.[6]

In *Gridley v. Cleveland Pneumatic Co.*, the Third Circuit adopted a fact-intensive test when finding that a plan document entitled "Employee Benefits Summary" and claiming to provide "quick reference" information for a benefits plan that should not be considered an SPD under the guidelines in ERISA ("the *Gridley* test").[7] In doing so, the court specifically mentioned four factors that it had relied upon to make its decision: 1) that no reasonable plan participant could have considered the brochure to be an SPD because it referred readers to their "summary plan descriptions or official plan documents for more details;" 2) that the brochure lacked all but two of the categories of information required under ERISA; 3) that the brochure's terms contained areas covered by existing SPDs; and 4) that the brochure was clearly an updated version of an older document not considered an SPD.[8] The *Gridley* test therefore calls on future courts to review the language in plan documents, as well as the context under which they were written, in order to determine whether they qualify as SPDs.

In *Hicks v. Fleming Cos.*, the Fifth Circuit specifically rejected the *Gridley* test as a result of the court's concerns that it would create an opportunity for inconsistency among the circuits.[9] Instead, the Fifth Circuit adopted a bright-line rule requiring that SPDs must contain "all or substantially all categories of information" required by ERISA and the DOL ("the *Hicks* test").[10] In support of its rule, the court cited Congress's strict filing requirements for SPDs,[11] holding that "[i]f a document is to be afforded the legal effects of an SPD . . . that document should be sufficient to constitute an SPD for filing and qualification purposes."[12]

However, the Fifth Circuit allowed for one possible exception to its bright-line rule. In dicta, the court stated that if a situation arose in which the plan administrators had intended a plan document to serve as an SPD, yet had accidentally omitted one of the categories of information, the document may still be able to be classified as an SPD.[13] Given that this was dicta, it remains to be seen whether a future court would choose to follow the Fifth Circuit's suggestion.

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6. Hicks v. Fleming Cos., 961 F.2d 537, 541-42 (5th Cir. 1992).
7. *Gridley*, 924 F.2d at 1312.
8. *Id.* at 1316-17.
9. *Hicks*, 961 F.2d at 542.
10. *Id.* (summarizing 29 U.S.C. § 1022(b)).
11. *See* discussion *infra* Part I.B.
12. *Id.*
13. *Id.*

B. Filing and Distribution Requirements for SPDs

Further complicating the situation are the strict filing and distribution requirements enacted by Congress. Under ERISA, an SPD must be filed with the Secretary of Labor within 120 days after the employee benefits plan becomes subject to the statute.[14] In addition, plan administrators are also required to provide a current SPD to every plan participant and their beneficiaries.[15] Plan administrators who fail or neglect to perform either of these duties may face civil liability for participants' lost benefits, in addition to a maximum fine of $1,000 a day.[16]

Congress designed these requirements to protect the interests of plan participants from the potential actions of unscrupulous plan administrators. However, without the presence of a universal standard for identifying SPDs, any plan administrator could be held liable or fined under these requirements. This is due to a problem not envisioned by Congress when enacting the filing and distribution guidelines. By the time a court has determined that a plan document is an SPD, ERISA's filing and distribution requirements have already been violated. While I am not aware of any cases in which a court has employed such a strict interpretation of ERISA, it is hard to see how a court relying upon the statute's plain language would be able to avoid unjustly punishing plan administrators technical, although unintentional violations of ERISA.

II. THE PROBLEM OF DEFICIENT SPDS

With all of the confusion surrounding the fundamental issue of determining when an SPD exists, it is no wonder that the courts have had difficulty resolving cases involving deficient SPDs. There are several ways in which an SPD can be deficient. For example, terms may be missing from the SPD, sections of the SPD may be ambiguous, or the SPD could directly conflict with the master policy. ERISA is silent on what should occur in the event that an SPD is deficient. Therefore, it has been left to the courts to determine 1) what terms should control in the event of a deficient SPD, and 2) what plaintiffs must prove in order to recover lost benefits because of a deficient SPD.

A. The Deficient SPD Always Control

Most of the circuit courts have adopted a bright-line rule that in the case of a deficient SPD, the terms of the SPD will control over those in the

14. 29 U.S.C. § 1024 (2000).
15. 29 U.S.C. § 1022(a) (2000).
16. 29 U.S.C. § 1132(c)(2) (2000).

master policy.[17] While such a rule may appear counterintuitive, the courts have relied upon ERISA's plain meaning, legislative intent, and general principles of public policy to justify the rule. Thus, the courts have held that such a rule is necessary in order to protect the millions of employees who rely upon SPDs as the only source of information regarding their benefit plans.[18]

Many courts have relied upon the plain language of ERISA when adopting the bright-line rule. Under ERISA's requirements, an SPD must be "'accurate' and 'sufficiently comprehensive' to reasonably apprise [benefits plan] participants of their rights and obligations under the plan."[19] This led the Fifth Circuit, in *Hansen v. Continental Insurance Co.*, to reject a defendant's claim that the master policy should control when there is a conflict between the master policy and the SPD.[20] As the court found, such a rule would "eviscerate" ERISA's SPD requirements, and thus directly contradict the plain meaning of ERISA's guidelines.[21]

In addition, courts have relied upon ERISA's legislative intent as supporting a bright-line rule that the deficient SPD will always control. In *Edwards v. State Farm Mutual Automobile Insurance Co.*, the court quoted a statement made during the adoption of ERISA, as support of the bright line rule, "[i]t is grossly unfair to . . . disqualify [an employee] from benefits if . . . [the] conditions [which led to the disqualification] were stated in a misleading or incomprehensible manner in the plan booklets."[22] Thus, there appears to be support for such a rule in the legislative intent behind ERISA's adoption.

Finally, the courts have relied upon general principles of public policy in order to support the bright-line rule. In an often reproduced passage from *McKnight v. Southern Life and Health Insurance Co.*,[23] the Eleventh Circuit found that "[i]t is of no effect to publish and distribute a plan

17. Of the circuit courts, the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh have all adopted similar rules. *See, e.g.*, Burke v. Kodak Ret. Income Plan, 336 F.3d 103, 113 (2d Cir. 2003); Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found., 334 F.3d 365, 378 (3d Cir. 2003); Pierce v. Sec. Trust Life Ins. Co., 979 F.2d 23, 27 (4th Cir. 1992); Hansen v. Cont'l Ins. Co., 940 F.2d 971, 982 (5th Cir. 1991); Edwards v. State Farm Mut. Auto Ins. Co., 851 F.2d 134, 136 (6th Cir. 1988); Senkier v. Hartford Life & Accident Ins. Co., 948 F.2d 1050, 1051 (7th Cir. 1991); Barker v. Ceridian Corp., 122 F.3d 628, 633 (8th Cir. 1997); Atwood v. Newmont Gold Co., 45 F.3d 1317, 1321 (9th Cir. 1995); Chiles v. Ceridian Corp., 95 F.3d 1505, 1515 (10th Cir. 1996).

18. *Burke*, 336 F.3d at 110.

19. *Hansen*, 940 F.2d at 981-82 (quotation marks omitted) (citing 29 U.S.C. § 1022(a)).

20. *Id.*

21. *Id.*

22. *Edwards*, 851 F.2d at 136 (alteration in original) (citing *H. R. Rep. No.* 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646).

23. 758 F.2d 1566 (11th Cir. 1985).

summary booklet designed to simplify and explain a voluminous and complex document, and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet."[24] The courts have also used similar arguments for resolving any ambiguities that may be found in the deficient SPD. Relying upon contract theory, some courts have used *contra proferentem*, holding that any ambiguities in the document should be decided against the parties who drafted it.[25] This rationale was employed by the Third Circuit in *Burstein v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation*, when it found that "[i]f an SPD conflicts with a plan document, then a court should read the terms of the 'contract' to include the terms of a plan document, as superseded and modified by conflicting language in the SPD."[26]

However, there is at least one possible exception to the rule. In *Burstein*, the court found that the use of a disclaimer stating that "the '[P]lan [D]ocument always governs'" might have provided notice to employees that they could not fully rely upon the SPD.[27] Ultimately, though, the Third Circuit held that the exception was not applicable in that case because of the original plan's relatively inaccessibility to employees.[28] Therefore, despite the disclaimer the SPD's terms would still control.[29]

B. The Appropriate Standard of Recovery

Yet, while most circuits are in agreement that the terms of the deficient SPD control over the master policy, it has been much harder for the courts to devise a uniform standard for recovery under a deficient SPD. Currently, there is a three-way circuit split regarding this issue, resulting in the adoption of three significantly different standards: detrimental reliance; reliance or possible prejudice; neither reliance nor prejudice.

1. The "Detrimental Reliance" Standard

Under the standard adopted by the Seventh and Eleventh Circuits, plan participants must prove detrimental reliance in order to recover under a deficient SPD.[30] Detrimental reliance requires plaintiffs to show that they

24. *Id.* at 1570.

25. Rhorer v. Raytheon Eng'rs and Constructors, Inc., 181 F.3d 634, 642 (5th Cir. 1999) (citing *Hansen*, 940 F.2d at 981).

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

27. *Id.* at 379.

28. *Id.* at 381.

29. *Id.*

30. *See, e.g.*, Andersen v. Chrysler Corp., 99 F.3d 846, 859 (7th Cir. 1996) (refusing to

"took action, resulting in some detriment, that they would not [otherwise] have taken."[31] The Eleventh Circuit has outlined its reasons for adopting this stringent standard by finding that anything less would impose a form of strict liability upon the plan administrators.[32] Furthermore, in *Branch v. G. Bernd Co.*, the court responded to attacks by other circuits which claimed that detrimental reliance went against ERISA's objectives by imposing technical judicial barriers to prevent plan participants from bringing suits against plan administrator:[33]

> [W]e do not share the . . . belief that we would undermine Congress' objectives by requiring beneficiaries to prove reliance on inaccurate plan summaries. 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." (citations omitted). Of course, when an employer provides an inaccurate plan summary, the beneficiaries who rely on that summary are not accurately apprised of their rights. But when a beneficiary fails to read or rely on the summary, whether it is accurate or not, the beneficiary also prevents full appraisal of the rights under the plan. Beneficiaries must do their part if Congress' objective is to be met.[34]

Thus, the Eleventh Circuit has clearly set out its reasons for supporting the adoption of a detrimental reliance standard.

The Seventh Circuit's rationale for adopting a detrimental reliance standard echoed the reasons established by the Eleventh Circuit. In *Andersen v. Chrysler Corp.*, the court found that there would be no cause of action under ERISA for technical violations of ERISA.[35] The court held that plan participants must demonstrate "bad faith, active concealment or detrimental reliance . . . ." in order to recover equitable relief.[36] Thus, while both courts have adopted the detrimental reliance standard, it appears

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find detrimental reliance where there has been a technical violation of ERISA's notification requirements); Branch v. G. Bernd Co., 955 F.2d 1574, 1579 (11th Cir. 1992) (finding that reliance on a plan summary must be shown).

31. Anderson v. Alpha Portland Indus., Inc., 836 F.2d 1512, 1520 (8th Cir. 1988) (alteration in original) (citing Monson v. Century Mfg. Co., 739 F.2d 1293, 1302 (8th Cir. 1984)).

32. *Branch*, 955 F.2d at 1578.

33. *Id.* at 1579.

34. *Id.* (internal citations omitted).

35. 99 F.3d at 859.

36. *Id.*

that the Seventh Circuit would require a finding similar to fraud on the part of the plan administrators before the court would allow a plan participant to recover under a deficient SPD.

2. The "Reliance or Possible Prejudice" Standard

Following the lead of the First Circuit in *Govoni v. Bricklayers, Masons and Plasterers International Union of America, Local No. 5 Pension Fund*, the Fourth, Eighth and Tenth Circuits have held that in order to "secure relief, . . . [a plaintiff] must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description."[37] While at first this may appear to be a somewhat lower burden of proof, it ultimately requires much of the same evidence that is needed under the detrimental reliance standard.[38] In *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, the First Circuit found that the *Govoni* standard contained principles of estoppel and therefore "relief is only appropriate if the participant demonstrates significant or reasonable reliance on the Plan Summary."[39] Thus, it appears that much of the court's review under the *Govoni* standard follows the necessary steps under detrimental reliance. This high burden of proof has caused at least the one circuit to consider the *Govoni* standard to be equal to requiring detrimental reliance.[40]

Yet, the difference lies in that the *Govoni* standard also calls for courts to make a "separate factual finding on the prejudice issue."[41] This provides the plan participant with another means to recover equitable relief under the deficient SPD by showing that he was prejudiced by the SPD's language.

The Tenth Circuit explained its reasons for adopting the *Govoni* standard as an attempt to find a fair solution that would not bankrupt the employee benefits system. In *Chiles v. Ceridian Corp.*, the court found that allowing participants to recover equitable relief at times other than when they had shown reliance or prejudice would allow participants to receive a windfall at the expense of their employers.[42] This, in turn would then "increase costs for employers and their insurers . . . [and possibly] jeopardize the solvency of the plan with respect to the remaining

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

38. Mauser v. Raytheon Co. Pension Plan for Salaried Employees, 239 F.3d 51, 55 (1st Cir. 2001).

39. *Id.*

40. Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found., 334 F.3d 365, 380 (3d Cir. 2003) (stating that the First Circuit "require[s] reliance.").

41. Aiken v. Policy Mgmt. Sys., Corp., 13 F.3d 138, 142 (4th Cir. 1993).

42. 95 F.3d 1505, 1519 (10th Cir. 1996).

employees."[43] Thus, by adopting the *Govoni* standard when dealing with deficient SPDs, courts have attempted to limit the field of potential plaintiffs in an attempt to preserve the stability of the benefit plan system in general, at the expense of those who have not read or relied upon their faulty SPDs but have still been denied deserved benefits.

3. The "Neither Reliance Nor Prejudice" Standard

Just recently, the Third Circuit adopted a third standard for recovery under a deficient SPD. In *Burstein*, the court found that the very same contract theory, which had provided guidance when the terms of the SPD conflict with the terms of the policy, could also be instrumental in considering the proper standard for recovery. The court held that:

> just as a court's enforcement of a contract generally does not require proof that the parties to the contract actually read, and therefore relied upon, the particular terms of the contract, we are persuaded that enforcement of an SPD's terms under a claim for plan benefits does not require a showing of reliance.[44]

This standard does not require plaintiffs to prove either reliance or prejudice in order to recover under a deficient SPD. Thus, the court found that since the SPD will always control, any decision should be based upon the terms in the SPD, as if the master policy was modified to reflect the changes.

III. *BURKE V. KODAK*: THE LIKELIHOOD OF PREJUDICE STANDARD

Prior to 2003, the Second Circuit was able to remain untouched by the controversy that had affected every other circuit. In fact, the Second Circuit had even gone so far as to decline a previous opportunity to rule on the issue, instead claiming that "[u]nlike most other circuits, this Court has not yet decided whether a showing of these factors is ever necessary for a plaintiff to succeed in an action brought under ERISA."[45] Yet, following an appeal in *Burke v. Kodak Retirement Income Plan* from District Court for the Western District of New York, the Second Circuit was finally forced to weigh in on the controversy.

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43. *Id.*
44. *Burstein*, 334 F.3d at 381 (italics omitted).
45. Feifer v. Prudential Ins. Co., 306 F.3d 1202, 1213 (2d Cir. 2002).

A. Background

The facts of the case are relatively straightforward. Mr. Kenneth Burke was an employee of Eastman Kodak for twenty-seven years until his death in 1999.[46] During his employment, Mr. Burke was a participant in Kodak's benefits plans, including Kodak's pre-retirement Survivor Income Benefits ("SIB") plan, which provided "a percentage of an employee's retirement income benefit to 'an *eligible spouse, domestic partner*, dependent child or dependent parent' at the time of the employee's death."[47] In 1991, Mr. Burke began living with his future wife, Sally. As domestic partners, they shared financial and emotional responsibilities, including caring for each other's children from prior marriages.[48] In March 1999, Mr. Burke was diagnosed with lung cancer and shortly thereafter, Mr. and Mrs. Burke were married.[49] Unfortunately, the marriage had lasted less than six months when Mr. Burke succumbed to his illness on November 9, 1999.[50] The following week, Kodak sent a letter to Mrs. Burke detailing the benefits that she could receive as a surviving spouse, given that the Burkes were married for at least one year.[51] Mrs. Burke alerted Kodak to the fact that she did not meet the definition of a "spouse" under the plan due to the length of their marriage, and was denied pre-retirement SIB.[52] Mrs. Burke appealed the denial maintaining that she qualified as a "domestic partner" under the plan.[53] However, Mrs. Burke's claim was denied again, this time because the Burkes had failed to file a joint affidavit stating that they wished to be eligible for "various types of benefits" as domestic partners.[54] Mrs. Burke brought suit against the Kodak Retirement Income Plan ("KRIP") and the Kodak Retirement Income Plan Committee ("KRIPCO") in the United States District Court for the Western District of New York.[55] Mrs. Burke's suit relied upon a suit issued in 1997 and alleged that the defendants had improperly denied her claim.[56] Mrs. Burke argued that although the SPD made sixteen references to the filing requirement, none were in the section explaining SIB.[57] Therefore, Mrs. Burke stated that the SPD was deficient and she

46. Burke v. Kodak Ret. Income Plan, 336 F.3d 103, 106 (2d Cir. 2003).
47. Burke v. Kodak Ret. Income Plan, 217 F. Supp. 2d 384, 388 (W.D.N.Y. 2002) (emphasis added).
48. *Burke*, 336 F.3d at 106.
49. *Id.*
50. *Id.*
51. *Burke*, 336 F.3d at 106.
52. *Id.*
53. *Id.*
54. *Id.* at 106-07
55. *Id.* at 106.
56. *Id.* at 106-07.
57. *Id.* at 109.

could not be held accountable for the joint-filing requirement.[58]

B. The District Court's Decision

On July 31, 2002, the district court found in favor of the KRIP and the KRIPCO. Citing previous decisions in the Fifth and Eleventh Circuits, the district court held that Kodak's SPD must be read as a whole and that isolated portions could not be used to go against the general impression of the document.[59] Therefore, the court found that the numerous references throughout the SPD to the filing requirement for domestic partners were sufficient to provide the Burkes with proper notice of their responsibilities.[60] Thus, the court held that the SPD was not deficient due to the fact that it had not mentioned the requirement in the SIB section.[61]

However, the district court went on to say this was not the only problem with Mrs. Burke's claim given that even in the alternative, she had not shown detrimental reliance upon the deficient section of the SPD.[62] The court's conclusion was based on Mrs. Burke's testimony that she had intentionally not joined Kodak's benefits plans as a domestic partner because she was "afraid it might not cover pre-existing medical conditions which had been covered by her employer."[63] Thus, the district court granted the defendants' motion for summary judgment and dismissed Mrs. Burke's complaint with prejudice.[64]

C. The Second Circuit's Decision

Upon appeal to the United States Court of Appeals for the Second Circuit, the court reversed the district court's finding that Kodak's SPD was not deficient.[65] The Second Circuit held that while there were sixteen references to the affidavit requirement in the SPD, the weight to be given these references was minimal due to the fact that they were spread throughout the SPD's more than 334 pages.[66] The court explained that to incorporate these clauses into the apparently self-contained SIB section, Kodak was required to include a cross-reference pointing towards the filing requirement.[67] The court stated that "a cross-reference would have required

58. *Id.* at 110.
59. Burke v. Kodak Ret. Income Plan, 217 F. Supp. 2d 384, 389 (W.D.N.Y. 2002).
60. *Id.*
61. *Id.*
62. *Id.* at 389-90.
63. *Id.* at 390.
64. *Id.* at 391.
65. Burke v. Kodak Ret. Income Plan, 336 F.3d 103, 110-11 (2d Cir. 2003).
66. *Id.*; *Burke*, 217 F. Supp. 2d at 387 n.1.
67. *Burke*, 336 F.3d at 111 (citing 29 C.F.R. § 2520.102-2(a)-(b) ("where a restriction

minimal effort and diligence to insert [and a] plan participant should not be expected to infer the eligibility requirements for SIB by reference to other self-contained benefits sections of the SPD."[68] While Kodak had made the necessary changes in both an employee newsletter and a benefits update, it never corrected an updated version of the SPD.[69] For these reasons, the court found that Kodak's SPD conflicted with the terms of the master policy and therefore was deficient.[70]

The Second Circuit also rejected the district court's dictum that Mrs. Burke's testimony "preclude[d] a finding of detrimental reliance."[71] Yet, instead of reviewing the trial record to determine whether Mrs. Burke did rely upon the deficient SPD, the Second Circuit began its own analysis of the different standards that had been adopted by the other circuits.[72]

In rejecting the detrimental reliance standard, the Second Circuit held that:

> "[a] rule requiring . . . detrimental reliance . . . imposes an insurmountable hardship on many plaintiffs," especially on the estate of a deceased participant, and "such a rule hardly advances the Congressional purpose of protecting the beneficiaries of ERISA plans by insuring that employees are fully and accurately apprised of their rights under the plan."[73]

The Second Circuit also reviewed the prejudice standards adopted by a number of circuits.[74] In ultimately rejecting these standards as well, the Second Circuit held that they did not place enough of the burden upon employers for creating faulty SPDs.[75] The court found that employees had no influence upon the drafting of the SPDs and were in a much more limited position to absorb the financial hardships that could result from a deficient SPD. In addition, employers could receive a benefit from drafting a faulty SPD: "a defense against certain state law claims."[76] Therefore, the court determined that even a prejudice standard was too heavy a burden to place on employees.

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on benefits is not 'in close conjunction' with a description of the benefits, cross-referencing is generally required").

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 111-12.

72. *Id.* at 111-14.

73. *Id.* at 112 (quoting Estate of Ritzer v. Nat'l Org. of Indus. Trade Unions Ins. Trust Fund Hosp., 822 F. Supp. 951, 955-56 (E.D.N.Y. 1993)).

74. *Id.* at 113.

75. *Id.*

76. *Id.*

Thus, the Second Circuit created its own "likelihood of prejudice" standard for recovery under a deficient SPD.[77] In hopes of preventing further confusion from the district courts, the Second Circuit explained the likelihood of prejudice standard:

> [W]e require for a showing of prejudice, that a plan participant or beneficiary was likely to have been harmed as a result of the deficient SPD. Where a participant makes this initial showing, however, the employer may rebut it through evidence that the deficient SPD was in effect a harmless error.[78]

Applying the likelihood of prejudice standard to Mrs. Burke's claim, the Second Circuit held that Kodak's deficient SPD was likely to have harmed the Burkes.[79] The court found that the absence of the filing requirement from the SIB section of SPD was likely to lead plan participants, such as the Burkes, to believe that they were eligible for the pre-retirement benefits without filing the necessary papers. Thus, the court held that the Burkes "suffered prejudice as a result of Kodak's deficient SPD."[80]

IV. ANALYSIS OF THE SPD TESTS

Before a proper analysis can be done on the current circuit split regarding the standard for recovery from a deficient SPD, a decision must first be made upon what constitutes an SPD. The two competing tests described previously each offer advantages and disadvantages in terms of their abilities to arrive at a result that is statutorily correct, consistent, and fair.

The *Hicks* test focuses solely upon the fairness to individual cases by creating fact specific test which is based upon the employer's intent *and* the employee's reasonable belief that the plan document was an SPD. However, while this may provide a fair result to the parties involved, the test ignores the statutory language of 29 U.S.C. § 1022(b), which states that an SPD "shall" have certain identified categories.[81] According to the *Hicks* test, a plan document could be found to be an SPD, despite the fact that it does not contain many of the characteristics that Congress envisioned, as long as the parties subjectively treated the document as an SPD. Such a loose rule on what constitutes an SPD goes against the statutory language

77. *Id.* at 113-14.
78. *Id.* at 113.
79. *Id.* at 114.
80. *Id.* at 114.
81. 29 U.S.C. § 1022(b) (2000).

of ERISA, in addition to creating a likelihood of inconsistency. Furthermore, the uniform adoption of the *Hicks* test would provide parties with little guidance for creating legally-valid SPDs, leading to an increase in both the number and costs of SPD-related litigations. Thus, it appears that the *Hicks* test, while increasing the likelihood of a fair result in individual cases, has the ability to produce systemic solutions that are contrary to the statutory language and intent of 29 U.S.C. § 1022(b).

While the *Gridley* test is an improvement over the *Hicks* standard in certain areas, it also has serious implications that ultimately make it as flawed as the test it was designed to replace. By establishing a bright-line rule requiring the inclusion of all of the categories listed by 29 U.S.C. § 1022(b), the *Gridley* test conforms to the language of the statute and provides for consistency in judicial decisions. However, this consistency could be used by unscrupulous employers to intentionally draft deficient SPDs so as to limit their liability all at the expense of their less legally-informed plan participants. This unanticipated result runs counter to the legislative intent behind ERISA, which was meant to increase, not decrease, the protections offered to employee benefit plan participants.[82]

Since neither test is able to completely conform to both the language and intent of Congress when enacting 29 U.S.C. § 1022(b), it is up to Congress to revise the statute to provide a clearer picture of what should be considered an SPD. I believe a standard similar to the *Gridley* test should be codified, with a caveat that allows courts to opt out of the bright-line rule in cases where the plan participant can demonstrate that the plan administrator intentionally drafted a deficient SPD. Yet, until Congress acts, I believe that the *Gridley* test is the lesser of the two evils, as it provides the result most consistent with ERISA.

V. ANALYSIS OF THE CIRCUIT SPLIT

Turning to the current debate surrounding the appropriate standard for recovery under a deficient SPD, each theory adopted by the courts has its strengths and weaknesses.

A. Detrimental or Substantial Reliance Standard

The detrimental or substantial reliance standards as adopted by the courts pose a significant challenge to employee benefit plan participants who wish to recover damages because of a deficient SPD. Both of these theories are based upon the notion that a plaintiff must have read the SPD

82. Paul J. Schnader & Barbara W. Freeman, eds., ERISA: A COMPREHENSIVE GUIDE, 1.6-1.9 (2d ed. 2003).

and taken steps to his detriment based upon the flaws in the document. While this standard undeniably prevents the flood of potential plaintiffs that can be found under less strict standards, it does so by creating a significant bar in favor of plan administrators, even after it has been shown that the administrator erred in providing an inaccurate summary plan to its employees. Questions remain concerning whether plan participants who rely upon another's oral explanation of the terms of the deficient SPD, as opposed to reading it, have still "relied" upon the SPD.

In addition, many of the decisions made regarding employee benefits plans do not lead themselves to demonstrating detrimental reliance. Often the plaintiffs actions as a result of a deficient SPD are indirect or delayed. Under detrimental reliance no responsibility is placed upon the plan administrator, who is in a much better position to understand its own benefits policies, for negligent and perhaps even intentional misrepresentations. Thus, I do not believe that the detrimental reliance standard properly distributes the effects that a deficient SPD may have, given the abilities of the respective parties to account for the potential consequences.

B. Burstein-Contractual Theory

In its evolutionary view of ERISA under general contract principles, as opposed to the estoppel doctrine adopted by most other circuits, the Third Circuit found a great deal of statutory support for its conclusion in *Burstein*.[83] It seems like common sense that a benefit plan should be treated as a contract between the employer and its employees, with each SPD as a summary of the contract's terms. Just as with a contract, it is not necessary that plaintiffs actually read or rely on the terms of the SPD in order to recover damages under it. Furthermore, by adopting such a low burden for potential plaintiffs, opponents to Burstein can argue that the Third Circuit's standard may actually encourage additional SPD litigation. This theory is that plan participants, who were unable to recover under alternative standards, will attempt to find some deficiency in the employer's SPD to recover lost benefits they were not even aware that they were eligible for. A dramatic increase, such as this, could potentially bankrupt the entire employee benefits plan system. Thus, by not restricting the number of potential plaintiffs at all under ERISA, the *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.

83. *See* discussion *supra* Part II.A.

C. Burke-Likelihood of Prejudice

In *Burke*, the Second Circuit avoided the problems that many of the other circuits have run into when adopting the *Govoni* standard. By instead creating its own likelihood of prejudice standard, the court recognized the difficulties that employee benefits plan participants would face by proving detrimental reliance given the nature of the situation.[84] Instead, the court in *Burke* placed a less burdensome standard upon plaintiffs alleging lost benefits because of a deficient SPD. This was meant to account for the employer's responsibility for the SPD in the first place, along with the employer's ability to better mitigate the harm caused.[85]

Yet, I am not sure if the court's presumption for the plan participant goes far enough to fashion an equal playing field between the employer and employee. Furthermore, the Second Circuit's standard leaves a great deal of discretion to the district judge's opinion. I believe that if this standard is to adequately protect the congressional objectives of ERISA, it must find some way to provide employees with more protection, through a consistent and equal recovery standard.

D. The Best Standard: A Combination of Burke and Burstein

After review of the arguments made by all three sides of the issue, I believe that the proper standard is some combination of the rules adopted by the courts in *Burstein* and *Burke*. Although I agree with the analysis used by both courts, and the resulting standards which place the burden upon employers for faulty SPDs, I do not feel that either court has been able to appropriately balance the Congressional intentions of ERISA with the overall public interest in a stable benefits plan system. The employee is in the worst position of all the parties to absorb the financial costs of deficient SPDs. However, the low bar provided by *Burstein* could have disastrous consequences upon the employee benefits plan system, as the unplanned increase in litigation awards could cause numerous employee benefits plan administrators to drastically increase plan participants' premiums, or even force some into bankruptcy to avoid the additional liability. Thus, while the courts are getting perpetually closer to a standard that is able to properly distribute responsibility and financial ability to absorb the consequences of a deficient SPD, they must always be wary of any rule which would end up harming the very employee plan participants that ERISA was originally enacted to protect.

84. Burke, 336 F.3d at 111.
85. *Id.* at 113.

VI. CONCLUSION

Since the adoption of ERISA in 1974, the SPD requirement, while an important tool for employee benefit plan participants, has caused a great deal of disagreement among the courts trying to interpret Congress's intent. This confusion has not only applied to what exactly Congress wished to be considered an SPD, but also the procedure for resolving SPDs that conflict with the terms of the master plan. The results of this confusion have led to a three-way circuit split regarding the appropriate standard of recovery under a different SPD. The most important issue for the courts to resolve lies in balancing the competing interests of congressional intent in enacting the SPD requirement in ERISA, while at the same time ensuring not to cause the bankruptcy of the entire employee benefits plan system. However, encouragement can be taken in the new developments, which deal with comparisons made between ERISA and contract law, and could be responsible for breaking the deadlock, especially since the Supreme Court has shown no interest in becoming entangled in this issue.[86] I believe that despite the problems in interpreting the SPD requirement in ERISA over the past two decades, the next several years will be influential, as either there will be congressional intervention or the adoption of a uniform standard by the courts, and the fate of millions of employee benefit plan participants, as well as billons of dollars of lost benefits will finally be resolved.

86. Burke v. Kodak Ret. Income Plan, 336 F.3d 103 (2d Cir. 2003) *cert. denied*, 124 S. Ct. 1046 (2004) (refusing to address the circuit split on the SPD requirement).