No. 09-804

In the Supreme Court of the United States

CIGNA CORPORATION, ET AL., PETITIONERS

v.

JANICE C. AMARA, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether participants in an employee benefit plan covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, who make an unrebutted showing of likely harm from a discrepancy between the description of benefits in the summary plan description (SPD) or summary of material modifications (SMM) and the description in other plan documents may recover benefits as promised in the SPD or SMM.

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INTEREST OF THE UNITED STATES

This case was brought under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, which the Secretary of Labor has primary authority for administering. At the Court's invitation, the United States filed an amicus brief at the petition stage.

STATEMENT

1. ERISA protects the interests of participants and their beneficiaries in "employee benefits plan[s]," which include "welfare" and "pension benefit plan[s]." 29 U.S.C. 1002(3). A "pension benefit plan" is "any plan, fund, or program * * * established or maintained by

an employer or by an employee organization * * * to the extent that * * * such plan, fund, or program * * * (i) provides retirement income to employees, or (ii) results in a deferral of income to employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. 1002(2)(A).

ERISA requires the plan administrator to furnish every participant and beneficiary with a copy of a summary plan description (SPD) and, where applicable, a summary of material modifications (SMM) to the plan. 29 U.S.C. 1024(b)(1). The SPD must be "sufficiently accurate and comprehensive to reasonably apprise * * * participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. 1022(a). The SMM must describe "any material modification in the terms of the plan." *Ibid.* The SPD and SMM must "be written in a manner calculated to be understood by the average plan participant." *Ibid.*

2. During 1997 and 1998, CIGNA Corporation converted its traditional defined benefit pension plan to a cash balance plan. Pet. App. 16a-17a. In a traditional defined benefit plan, each employee's benefit is generally expressed as an annuity beginning at normal retirement age and calculated based on his compensation and years of service. *Id.* at 9a. In a cash balance plan, each employee's benefit is generally expressed as the amount in a hypothetical account. The account balance increases over time with hypothetical contributions—pay credits, which are based on a percentage of the employee's compensation, and interest credits, which are based on application of a specified interest rate to the account balance. *Id.* at 12a.

In converting to the cash balance plan, CIGNA used a transition method called the "greater of A or B." To

implement that method, CIGNA modified the formal written instruments establishing the plan by first freezing the benefits employees had accrued under the traditional defined benefit formula (Part A) and then providing that, going forward, employees would receive the greater of those frozen benefits (which ERISA prohibited CIGNA from reducing, 29 U.S.C. 1054(g)) or the benefits under a new cash balance formula (Part B). Pet. App. 13a-14a, 16a-22a. Under this approach, a participant would not accrue additional benefits under Part B until the balance in his hypothetical account exceeded his accrued benefits under Part A. *Id.* at 13a-14a, 22a-25a. Depending on the assumptions used in converting the plan, it could take years for an employee's Part B benefit to catch up with, or "wear away," his accrued Part A benefit. During those "wear away" periods, the employee would work without earning any additional benefits. *Id.* at 25a.

An alternative transition method, called "A plus B," would not have included "wear away." Pet. App. 13a. Although ERISA permitted the "greater of A or B" approach at the time of CIGNA's conversion, ERISA no longer permits that approach. For conversions after June 29, 2005, post-conversion benefits cannot be less than those provided by the "A plus B" approach. Pension Protection Act of 2006, Pub. L. No. 109-280, § 701(a), 120 Stat. 981 (29 U.S.C. 1054(b)(5)(B)(iii)).

CIGNA implemented the "greater of A or B" approach by creating an opening balance for each participant under Part B that was based on his accrued benefits under Part A but excluded the value of some of those benefits, such as early retirement benefits. Pet. App. 19a & n.4. Because of that decision, and CIGNA's choice of discount rates and mortality risk adjustments, a par-

ticipant's Part B opening balance was frequently much less than the present value of his Part A accrued benefit. *Id.* at 23a, 121a-123a. For example, respondent Amara's opening balance was less than half her accrued benefit. *Id.* at 23a. As a result, many employees experienced extended "wear away" periods, sometimes lasting for years. *Id.* at 23a-25a. Indeed some employees were never able to "wear away" the difference between their frozen Part A benefits and their Part B benefits. *Id.* at 25a-26a, 125a-126a.

CIGNA was aware that employees would experience "wear away" under the modified formal plan instruments but did not inform employees about that possibility. Pet. App. 29a, 118a-119a. Instead, CIGNA distributed documents indicating that employees would accrue additional benefits without "wear away." *Id.* at 126a-127a. In a November 1997 newsletter, CIGNA informed employees that the conversion would "significantly enhance its retirement program," J.A. 990a, and that the amended plan would provide "benefit growth throughout [each employee's] career," J.A. 993a.[1]

In December 1997, CIGNA sent each participant a retirement kit, which CIGNA later identified as the SMM required by ERISA. Pet. App. 33a, 95a. The retirement kit also described the changes to CIGNA's retirement program as enhancements. J.A. 947a. Although the kit provided details about the calculation of Part B opening balances, it did not describe all of the

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[1] CIGNA later identified that newsletter as the notice required by 29 U.S.C. 1054(h), which mandates advance notice of an amendment to a defined benefit pension plan that provides for a significant reduction in the rate of future benefit accrual. Pet. App. 95a. The district court found that the newsletter did not comply with that requirement, *id.* at 95a-114a, but that ruling is not at issue here.

discounts applied in calculating those balances. J.A. 941a-943a. In addition, it stated that "[e]ach dollar's worth of credits [to a participant's Part B account] is a dollar of retirement benefits payable to [the participant] after [he is] vested," J.A. 963a, and that participants "will see the growth in [their] total retirement benefits from CIGNA every year," J.A. 952a.

In October 1998 and September 1999, CIGNA issued SPDs for the new plan. Pet. App. 39a. The SPDs stated that a participant's opening balance under Part B "was equal to the lump sum value of the pension benefit [the participant] earned" under Part A. J.A. 906a, 928a. The SPDs further stated that "[e]ach dollar's worth of credit is a dollar of retirement benefits payable to [participants] after [they] are vested," *ibid.*, and reported that a participant's account would "continue to grow every year [the participant was] with CIGNA," J.A. 904a, 927a. The SPDs thus described an "A plus B," rather than "greater of A or B," approach.

When CIGNA furnished the SPDs to participants, it was aware that 92% of employees responding to a December 1997 survey had stated that they "thoroughly read the retirement communications [they] received." J.A. 895a. CIGNA was also aware that employees lacked full information about the provisions in the formal plan instruments, including "wear away," yet CIGNA chose not to inform employees about them. Pet. App. 110a-113a. CIGNA wanted to avoid employee protests, which had caused other employers to abandon or scale back similar conversions. *Id.* at 113a-114a. CIGNA's strategy successfully avoided organized employee opposition. *Id.* at 114a.

3. In 2001, respondents brought a class action lawsuit against petitioners in federal district court. Pet.

App. 41a. As relevant here, respondents alleged that petitioners had failed to comply with ERISA's SPD and SMM provisions. *Id.* at 94a.

In February 2008, after an extensive bench trial, the district court determined that petitioners had violated those requirements. Pet. App. 5a-159a. The court reasoned that "wear away" was a material fact that the SMM and SPDs failed to disclose despite petitioners' awareness that many employees would experience it under the formal plan instruments as amended. *Id.* at 118a-126a. The court also found that the SPDs and SMM affirmatively led participants to believe that all benefits accrued under Part A, including early retirement benefits, would be included in determining opening account balances under Part B and that employees would steadily earn additional benefits without "wear away." *Id.* at 126a-131a.

The court rejected petitioners' argument that respondents were not entitled to relief because they failed to demonstrate injury. Pet. App. 131a-137a. The court noted that, under circuit precedent, participants may recover benefits based on a deficient SPD if they establish likely prejudice or harm. *Id.* at 131a-133a (citing *Burke* v. *Kodak Ret. Income Plan*, 336 F.3d 103 (2d Cir. 2003), cert. denied, 540 U.S. 1105 (2004)). If a participant makes that showing, the court explained, "the employer may rebut it through evidence that the deficient SPD was in effect a harmless error." *Id.* at 132a (quoting *Burke*, 336 F.3d at 113). The court found that respondents had shown likely harm because the SPDs and SMM "'likely, and quite reasonably, led plan participants to believe' that wear away was not a likely result of the transition" to the new plan. *Id.* at 136a (citation omitted). In addition, the court observed, the SPDs and

SMM deprived employees of the opportunity to take timely action in response to the conversion, including protesting when the new plan was implemented. *Id.* at 137a. The court further found that petitioners had not established harmless error, rejecting petitioners' contention that other materials distributed to participants made clear that the cash balance plan would include "wear away." *Id.* at 133a.

In June 2008, the court issued an opinion addressing the appropriate remedy. Pet. App. 160a-221a. The court concluded that no issues remained regarding whether individual participants were harmed. *Id.* at 162a-169a. It rejected as contrary to Second Circuit precedent petitioners' argument that each participant must individually prove detrimental reliance. *Id.* at 165a n.1. The court also refused to afford petitioners further opportunity to prove harmless error because they had failed to take advantage of earlier opportunities. *Id.* at 166a. In particular, the court noted, petitioners had declined to engage in discovery to determine whether class members had actual knowledge of "wear away," and petitioners had failed to call any participants as witnesses at trial. *Ibid.* Accordingly, the court ordered petitioners to provide benefits using the "A plus B" approach, which accords with the promises in the SPDs and SMM that the plan would not include "wear away." *Id.* at 194a-201a.

4. The court of appeals affirmed in an unpublished order, Pet. App. 1a-4a, relying on "substantially the reasons stated" by the district court, *id.* at 4a.

SUMMARY OF ARGUMENT

The courts below held that ERISA plan participants who show likely harm from a failure to abide by an SPD

are entitled to the benefits promised by the SPD unless the plan and the administrator establish that not adhering to the SPD was harmless. Under that rule, when, as in this case, the SPD clearly promises materially greater benefits than the more formal plan instruments, the SPD controls, unless the defendants show that the participant did not reasonably expect to receive the more favorable benefits. That rule is correct.

A. ERISA requires fiduciaries to discharge their duties in accordance with the documents governing the plan insofar as they are consistent with ERISA. 29 U.S.C. 1104(a)(1)(D). The SPD is a governing plan document, and a benefits determination is a fiduciary decision. Accordingly, an administrator must follow the SPD when deciding benefits claims, and an administrator would violate Section 1104(a)(1)(D) by interpreting the plan to deny or restrict benefits promised in the SPD. Although Section 1104(a)(1)(D) also requires the administrator to adhere to other plan documents, read together with ERISA's SPD requirements, it indicates that the SPD ordinarily overrides other documents if they conflict. Section 1104(a)(1)(D) provides that fiduciaries should adhere to plan documents only when consistent with ERISA's requirements, and giving effect to documents that deny benefits that the SPD states the plan provides would be inconsistent with ERISA's SPD provisions, which require the SPD accurately to reflect plan terms, 29 U.S.C. 1022. Giving primacy to more favorable terms in the SPD, except when a participant does not reasonably expect those terms to govern, is also consistent with the SPD's statutory role as the primary mechanism for apprising participants of their rights under the plan.

That approach also best balances the contract and trust law principles underlying ERISA. Under contract law, the SPD should control over less accessible underlying documents, whether or not participants show harm or reliance. In the analogous situation of group insurance policies, the statutorily required certificate of insurance summarizing the underlying policy generally prevails over terms in the policy that are less favorable to participants. Trust law, however, ordinarily permits recovery for breach of trust only when beneficiaries are harmed. Trust law supports the burden-shifting approach utilized by the courts below because a breaching fiduciary generally has the burden of proving lack of harm once the beneficiary makes a prima facie case.

The "likely harm" approach also furthers ERISA's goal of protecting employees' justified expectations of receiving the benefits promised to them, because employees reasonably expect to receive the benefits promised in the SPD unless they know about less favorable terms in other documents and should reasonably expect them to govern. This framework also advances ERISA's goal of ensuring that participants understand their rights and obligations under the plan by encouraging employers and administrators to comply with ERISA's command that the SPD accurately and comprehensively state those rights and obligations. At the same time, this approach avoids unduly discouraging plan formation or undermining plan solvency by precluding participants from receiving windfall recoveries if the defendants can show that the participants were not actually harmed by the discrepancy between the SPD and other documents.

B. Petitioners' contention that participants must prove detrimental reliance in order to recover benefits promised in the SPD is inconsistent with the SPD's sta-

tus as a governing plan document. Contrary to petitioners' contentions, the formal plan instrument is not itself the plan, and an SPD that conflicts with other plan documents is not an invalid plan amendment. The plan is a set of rules that define participants' rights to benefits, and the SPD is the authoritative statement of those rules for participants. A detrimental reliance requirement would also be contrary to the contract and trust law underpinnings of ERISA and would undermine its purposes.

C. This Court should not address petitioners' contention that an action for benefits based on the SPD can be brought only under ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3). Petitioners did not raise that issue in the court of appeals or their certiorari petition, and it is not fairly included in the question presented. If the Court nonetheless addresses the issue, it should conclude that an action to recover benefits based on the SPD is properly brought under ERISA Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B). That section authorizes actions to recover benefits under the terms of a plan, to enforce rights under the terms of a plan, or to clarify rights to future benefits under the terms of a plan. An action for benefits based on an SPD's status as a governing plan document falls within that authorization and is consistent with ERISA's structure and purposes.

D. The lower courts properly applied the "likely harm" standard. Although the formal instruments establishing the cash balance plan provided for "wear away" periods during which some employees would work for years without accruing additional benefits, the SPDs and SMM indicated that all participants would accrue additional benefits continuously under the new plan, without "wear away." The SPDs and SMM likely led

reasonable participants to expect that the plan would not include "wear away." And petitioners failed to establish that any employee was aware of the less favorable terms in the formal plan instruments or did not reasonably expect to receive the benefits promised in the SPDs and SMM.

ARGUMENT

PARTICIPANTS WHO SHOW LIKELY HARM FROM A FAILURE TO ABIDE BY A SUMMARY PLAN DESCRIPTION (SPD) ARE ENTITLED TO THE BENEFITS PROMISED IN THE SPD UNLESS THE PLAN DEFENDANTS ESTABLISH THAT NOT ADHERING TO THE SPD WAS HARMLESS

Under the rule applied by the courts below, when the SPD's description of plan terms conflicts with the description in another plan document, participants who show likely harm from a failure to adhere to the SPD are entitled to the benefits that it promised, unless the plan or its administrator demonstrates that failing to follow the SPD was harmless. A participant can carry that initial burden by showing that the SPD likely led a reasonable participant to expect materially more favorable benefits than those described in the other document. See *Burke* v. *Kodak Ret. Income Plan*, 336 F.3d 103, 114 (2d Cir. 2003), cert. denied, 540 U.S. 1105 (2004); Pet. App. 136a. The plan defendants can then establish harmlessness by showing that, despite the SPD, a reasonable person in the participant's position would not have expected to receive the more favorable benefits—for example, because he was aware of the other, less favorable plan terms and should have expected them to govern. See *ibid.*; *e.g.*, *Schad* v. *Stamford Health Sys., Inc.*, 358 Fed. Appx. 242, 244 (2d Cir. 2009). Thus, where, as here, the SPD clearly promised materially

greater benefits than the more formal plan instruments, the SPD controls unless the defendants show that disregarding the SPD would cause no loss because the participant did not reasonably expect to receive the benefits the SPD promised. That rule is consistent with ERISA's text, its contract and trust law underpinnings, and its purposes.

A. ERISA's Text, Contract And Trust Law, And ERISA's Purposes Support The "Likely Harm" Approach

1. ERISA was enacted "to protect * * * the interests of participants in employee benefit plans and their beneficiaries," 29 U.S.C. 1001(b), and to ensure that they receive their "contractually defined benefits." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 113 (1989) (citation omitted). To achieve those goals, ERISA imposes various obligations on plan administrators and other fiduciaries, including that they "discharge [their] duties with respect to a plan * * * in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]." 29 U.S.C. 1104(a)(1)(D).

As that provision reflects, multiple "documents and instruments" typically govern a plan. The SPD (and the closely-related SMM) are among those governing documents. See *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 877 (2009) (identifying the SPD as one of the "documents and instruments governing the plan"); *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 84 (1995) (explaining that 29 U.S.C. 1024(b)(2) and (4), which require administrators to make available the SPD and certain other documents, ensure

access to the "governing plan documents"); U.S. Invitation Br. 11 (citing court of appeals cases).

Indeed, the SPD is, in significant respects, the paramount plan document. It is the only document that all participants are guaranteed to receive on a regular basis, and ERISA "contemplates that [it] will be an employee's primary source of information regarding employment benefits." *Burstein* v. *Retirement Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 378 (3d Cir. 2003) (emphasis and citation omitted). The SPD (and, if applicable, the SMM) are the only plan documents that must be provided to participants automatically and without charge. 29 U.S.C. 1024(b)(1). Other documents—including the formal "written instrument" under which the plan is "established," 29 U.S.C. 1102(a)(1)—need only be made available upon request, and the administrator may charge for providing copies. 29 U.S.C. 1024(b)(2) and (4). For that reason, the SPD is frequently the only document describing plan terms that participants ever receive. Peter J. Weidenbeck, *ERISA in the Courts* 84 (2008). The SPD, rather than the formal written instrument, is thus the primary mechanism for "communicat[ing] to beneficiaries the essential information about the plan" and achieving "one of ERISA's central goals"—ensuring that participants and beneficiaries accurately understand their rights and obligations. *Curtiss-Wright*, 514 U.S. at 83.

The primacy of the SPD is underscored by the statutory requirements that it be "sufficiently accurate and comprehensive to reasonably apprise * * * participants and beneficiaries of their rights and obligations under the plan" and "be written in a manner calculated to be understood by the average plan participant."

29 U.S.C. 1022(a). Thus, the SPD must provide understandable notice of, among other things, "the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. 1022(b). Department of Labor (DOL) regulations reinforce the SPD's critical role, mandating that it "must not have the effect [of] misleading, misinforming or failing to inform participants" and that "[a]ny description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized." 29 C.F.R. 2520.102-2(b).

Because the SPD is a governing plan document, the directive in 29 U.S.C. 1104(a)(1)(D) that fiduciaries act in accordance with plan documents requires plan administrators to adhere to the SPD. ERISA "provides no exemption from this duty when it comes time to pay benefits," *Kennedy*, 129 S. Ct. at 875, because a benefits determination is a fiduciary act, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 218 (2004). Thus, an administrator must follow the terms of the SPD when deciding a benefits claim, see *Kennedy*, 129 S. Ct. at 875-877, and the administrator would violate Section 1104(a)(1)(D) and abuse its discretion by interpreting the plan to deny or restrict benefits to which the SPD states participants are entitled. *E.g.*, *Rhoton* v. *Central States, Se. & Sw. Areas Pension Fund*, 717 F.2d 988, 989-991 (6th Cir. 1983).

Section 1104(a)(1)(D) of course also requires administrators to adhere to other governing documents, including the formal written instrument establishing the plan. While nothing in ERISA expressly addresses whether, or in what circumstances, the SPD controls

over other documents if there is a clear conflict, Section 1104(a)(1)(D) and ERISA's SPD provisions together indicate that the SPD ordinarily should prevail over less favorable terms in other documents. Section 1104(a)(1)(D) requires fiduciaries to act in accordance with plan documents only "insofar as" those documents "are consistent with" ERISA's requirements. 29 U.S.C. 1104(a)(1)(D). Giving effect to other documents that restrict or deny benefits that the SPD describes the plan as providing would not be "consistent with" ERISA's SPD provisions, which require that the SPD accurately and comprehensively describe benefits under the plan. 29 U.S.C. 1022. By contrast, interpreting the plan in accordance with the SPD, rather than other conflicting documents, avoids a violation of the SPD provisions and accords with Section 1104(a)(1)(D)'s proviso that fiduciaries may not follow documents that are inconsistent with ERISA's requirements.

Giving primacy to more favorable terms in the SPD (except when a participant did not reasonably expect those terms to govern) also accords with the SPD's statutory role as the primary mechanism for apprising participants of their rights under the plan. Indeed, allowing less favorable terms in the less accessible and more complex formal instrument to "supersede the terms of the [SPD] would defeat the purpose of providing the employees with summaries." *Heidgard* v. *Olin Corp.*, 906 F.2d 903, 908 (2d Cir. 1990).

2. To the extent ERISA's text and structure do not resolve when a participant may recover benefits based on an SPD that conflicts with other plan documents, the Court should consider contract and trust law principles. Contract law is relevant because benefits protected by ERISA are "contractually defined." *Firestone*, 489 U.S.

at 113 (quoting *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 (1985)). Trust law is relevant because it informs interpretation of ERISA's fiduciary duties, *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996), including the duty to adhere to plan documents. The approach adopted by the courts below appropriately balances the relevant contract and trust law principles.

a. Contract law suggests that courts should give effect to the SPD without any inquiry into harm or reliance. A party to a contract need not show harm or reliance in order to enforce the contract's terms. *Washington* v. *Murphy Oil USA, Inc.*, 497 F.3d 453, 458-459 (5th Cir. 2007); *Burstein*, 334 F.3d at 381. And, under established principles of contract interpretation, the terms in the SPD embody the terms of the plan, notwithstanding any ambiguity produced by conflicting statements in other documents. When the terms of a written contract are ambiguous, courts give them the meaning that the promisor should reasonably have expected the other party to give them. 11 Richard A. Lord, *Williston on Contracts* § 31:2, at 266 (4th ed. 1999) (*Williston*); *id.* § 31:11, at 352-353; see also 2 Restatement (Second) of Contracts § 201(2), at 83 (1981). Because the SPD is the only plan document that all participants must receive, and ERISA requires that it accurately and comprehensively describe the plan's terms, an employer should reasonably expect that employees will understand the SPD as accurately embodying those terms. See also 11 *Williston* § 30:20, at 219-220 (contracts are interpreted in conformity with applicable federal law).

That approach appropriately reflects the basic fact, recognized by Congress in enacting ERISA, see, *e.g.*, S. Rep. No. 127, 93d Cong., 1st Sess. 3 (1973) (*Senate Report*), that pension benefits are part of the compensa-

tion offered by employers for employees' services. Because ERISA requires the SPD accurately to reflect those benefits, employees are ordinarily entitled to receive the compensation promised by the SPD in return for their services, just as they are entitled to receive the wages the employer has promised. It is therefore fair to give effect to the SPD unless the employer establishes that the employee should have understood that his compensation would actually be governed by other, less favorable terms.

Courts generally apply a similar rule in the analogous situation of group insurance policies. Just as ERISA requires participants to receive SPDs that "reasonably apprise" them of their rights and obligations under the plan, 29 U.S.C. 1022(a), state statutes often require insurance companies to provide group policy participants with certificates of insurance that "apprise" them "of the rights [they] may expect and the obligations [they] assume[]." 1 John Alan Appleman & Jean Appleman, *Insurance Law & Practice* § 46, at 155-156 (rev. 1981) (*Appleman*). Under the prevailing rule, when the certificate promises more favorable benefits than the underlying policy, participants are entitled to the benefits described in the certificate. *Ibid.*; 16 *Williston* § 49:26, at 139-140 (4th ed. 2000); 1A Steven Platt et al., *Couch on Insurance* § 8:19, at 8-48 (3d ed. 2005).

b. Contract law is not, however, the sole guide for interpreting ERISA. Trust law also informs ERISA's interpretation, and it supports the approach adopted by the courts below: although a participant who has been denied benefits promised by the SPD is presumptively entitled to those benefits, the plan defendants may rebut that presumption by showing that the participant did not

reasonably expect to receive the benefits and therefore would suffer no loss from the failure to provide them.

The prevailing rule under trust law is that when a beneficiary shows a breach of trust and a prima facie case of loss resulting from the breach, the burden shifts to the trustee to prove that any loss is not attributable to the breach. See George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 871, at 156-157 (rev. 2d ed. 1995) (*Bogert*); 1 Restatement (Second) of Trusts §§ 205 cmt. f at 460 (1959) (Restatement); *id.* § 212(4) & cmt. e at 484, 486. Courts applied that rule in pension cases arising under pre-ERISA law, including in determining whether employees were entitled to benefits notwithstanding their failure to comply with eligibility requirements that plan trustees failed to disclose. See *Nedd* v. *United Mine Workers*, 556 F.2d 190, 211 (3d Cir. 1977); *Branch* v. *White*, 239 A.2d 665, 674 (N.J. Super. Ct. App. Div. 1968). Most courts of appeals also apply that rule to breach of fiduciary duty claims under ERISA. See, *e.g.*, *McDonald* v. *Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995), cert. denied, 516 U.S. 1174 (1996); *Martin* v. *Feilen*, 965 F.2d 660, 671 (8th Cir. 1992), cert. denied, 506 U.S. 1054 (1993); but see, *e.g.*, *Silverman* v. *Mutual Benefit Life Ins. Co.*, 138 F.3d 98, 104 (2d Cir.), cert. denied, 525 U.S. 876 (1998). The framework applied by the courts below similarly requires the plan defendants to show there was no actual loss of expected benefits if the participant first shows that the SPD promised the claimed benefits.

3. That rule also furthers ERISA's purposes, including its primary goal of "protecting employees' justified expectations of receiving the benefits their employers promise them." *Central Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739, 743 (2004). That goal is advanced

by giving an employee the benefits clearly promised in the SPD unless the plan defendants establish that the employee did not reasonably expect to receive those benefits. The SPD is the only plan document that every employee receives, and ERISA requires that it describe the plan's benefits as accurately and comprehensively as necessary to inform employees of their rights. An employee is therefore justified in expecting to receive the benefits described in the SPD unless he knew about less favorable terms in other documents and reasonably should have expected them to govern.

Another important goal of ERISA is ensuring that participants accurately understand their rights and obligations under the plan. *Curtiss-Wright*, 514 U.S. at 83. The approach followed here advances that goal by encouraging employers and plan administrators to ensure that SPDs are, as ERISA commands, "sufficiently accurate and comprehensive to reasonably apprise * * * participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. 1022(a).

At the same time, this approach accommodates employers' interests, allowing them to defeat a claim to benefits by showing that the participant should reasonably have expected that less favorable terms in other documents would govern. This framework thus avoids the possibility that such participants will receive windfalls at the expense of plans and sponsoring employers. It thereby appropriately takes into account the importance that ERISA places on maintaining plan solvency and not unduly discouraging employers from offering

ERISA plans. See *Conkright* v. *Frommert*, 130 S. Ct. 1640, 1649 (2010).[2]

4. The "likely harm" approach also reflects a sensible allocation of the burden of proof. ERISA's SPD provisions and DOL's regulations require "an SPD that is accurate, comprehensible, and clear regarding restrictions on eligibility for benefits." *Burke*, 336 F.3d at 113; 29 U.S.C. 1022; 29 C.F.R. 2520.102-2. An affected "employee is powerless to affect the drafting" of the SPD and "less equipped" than the employer or the plan "to absorb the financial hardship of the employer's errors." *Burke*, 336 F.3d at 113.

Moreover, it is reasonable to presume that employees expect to receive the benefits promised in the SPD because the SPD is generally the only plan document that employees see, and ERISA requires that it accurately reflect their promised benefits. Yet an employee may have significant difficulty proving that he relied on the SPD in forming an expectation about his pension benefits as part of the total compensation for his services. Many participants rely at least in part on oral

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[2] Petitioners incorrectly contend (Br. 19) that if the SPD ordinarily trumps other documents when its terms are more favorable to employees, the SPD must also supersede those documents when its terms are less favorable. Courts have rejected that proposition because it would undermine ERISA's SPD requirements by effectively rewarding employers for permitting discrepancies between the SPD and other expressions of plan terms. See, *e.g.*, *Jobe* v. *Medical Life Ins. Co.*, 598 F.3d 478, 483 (8th Cir. 2010). Permitting the SPD to control when other documents are more favorable to employees would also be inconsistent with the contract law principle that ambiguities in a contract are construed against the drafter, 11 *Williston* § 32:12, at 471-476, and with the treatment of certificates of insurance, which generally do not control over more generous terms in the underlying policy, *Appleman* § 46, at 158-159.

representations and discussions with coworkers for information about the plan. See *Burke*, 336 F.3d at 113. As a result, representations about benefits made in an SPD frequently propagate throughout the workplace, even among those who never read the SPD itself. An employee would therefore often have difficulty establishing that the SPD was the source of his understanding about plan benefits. And he would have equal, if not greater, difficulty proving that he was unaware of divergent descriptions of benefits in other documents. Those difficulties of proof would likely be particularly severe in large workplaces and when benefit suits are litigated several years after dissemination of the relevant documents (situations that, as this case illustrates, are not uncommon).

B. A Detrimental Reliance Requirement Would Be Inconsistent With ERISA's Text, Origins, And Purposes

1. Petitioners' contention that participants may recover benefits promised in the SPD only if each affirmatively proves actual reliance on it to his detriment is inconsistent with the statutory scheme. As described above, the SPD is a governing plan document that sets out the plan's terms. Participants need not prove that they relied on plan documents to establish their right to benefits. On the contrary, 29 U.S.C. 1104(a)(1)(D) requires administrators to pay benefits in accordance with the plan documents, and Section 502(a)(1)(B) of ERISA "reinforces th[at] directive" by giving participants a cause of action "to recover benefits due to [them] under the terms of [their] plan." *Kennedy*, 129 S. Ct. at 875 (quoting 29 U.S.C. 1132(a)(1)(B)). A detrimental reli-

ance requirement cannot be squared with those statutory provisions.[3]

Although ERISA requires that a plan be "established and maintained pursuant to a written instrument," 29 U.S.C. 1102(a)(1), petitioners are incorrect in contending (Br. 14-15) that the "plan" consists exclusively of that document. ERISA does not define the term "plan" except in a circular manner. See 29 U.S.C. 1002(1)-(3). As this Court has explained, a "plan" is not any single document but a "scheme[,] decided upon in advance," that "comprises a set of rules that define the rights of a beneficiary and provide for their enforcement." *Pegram* v. *Herdrich*, 530 U.S. 211, 223 (2000).[4] ERISA recognizes that those rules are often described in multiple "documents and instruments," 29 U.S.C. 1104(a)(1)(D); see 29 U.S.C. 1024(b)(2) and (4). But ERISA requires the SPD to be the authoritative statement of the plan's terms for participants—mandating that it accurately describe participants' rights and obli-

[3] Petitioners argue (Br. 25) that reliance is required because the SPD's purpose is to "apprise" participants of their rights under the plan. To the contrary, the fact that 29 U.S.C. 1022(a) requires the SPD to be "sufficiently accurate and comprehensive to reasonably apprise" participants of their rights underscores the centrality of the SPD as a plan document and indicates that participants therefore can reasonably expect to receive the benefits it promises. Moreover, other plan documents, including the formal plan instrument, also serve an informational purpose when a participant gains access to them. *Curtiss-Wright*, 514 U.S. at 83.

[4] The statutory provisions on which petitioners themselves rely (Br. 15) indicate that the "plan" is distinct from the "written instrument" required by 29 U.S.C. 1102(a)(1). Those provisions describe that "instrument" not as the plan itself but as a document "pursuant to" which the plan is "established and maintained," *ibid.*, or "under which the plan was established or is operated," 29 U.S.C. 1024(b)(2); see 29 U.S.C. 1029(c).

gations, be understandable to the average participant, and be provided without request or charge to every participant. 29 U.S.C. 1022, 1024(b)(1). Thus, if any single document embodies the plan in terms known to all parties, that document is the SPD, not the formal plan instrument.[5]

Petitioners also mistakenly assert that the SPD cannot be a plan document because ERISA "assigns the responsibility for drafting" the SPD to the plan administrator rather than the sponsoring employer. Pet. 15-16. ERISA does not assign "drafting" of the SPD to the administrator. ERISA requires the administrator to "furnish * * * a copy of the [SPD] to each participant," 29 U.S.C. 1024(b)(1), just as ERISA requires the administrator to "furnish a copy" of the "other instruments under which the plan is established or operated" to any participant upon request, 29 U.S.C. 1024(b)(4). ERISA does not specify who determines the content of the SPD and does not preclude the employer from doing so or excuse the employer from monitoring what the administrator does.

Because the SPD is a governing plan document, petitioners err (Br. 16-19) in equating an SPD that conflicts with other documents to an unauthorized and invalid plan amendment. *Curtiss-Wright* is not to the contrary. In *Curtiss-Wright*, the court of appeals held that a revision to an SPD that purported to terminate participants'

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[5] The only case cited by petitioners (Br. 14) stating that the SPD is not a plan document is *Gridley* v. *Cleveland Pneumatic Co.*, 924 F.2d 1310 (3d Cir.) (Alito, J.), cert. denied, 501 U.S. 1232 (1991). The Third Circuit has made clear, however, that those statements in *Gridley* were dicta and that it views the SPD as an authoritative statement of plan terms that trumps less favorable descriptions in other documents. *Burstein*, 334 F.3d at 377.

health benefits was an invalid amendment because neither the SPD nor the other plan documents contained an amendment procedure. 514 U.S. at 75-77. This Court reversed, agreeing with the employer that a provision in the plan's constitution giving the company the right at any time to amend the plan satisfied the requirement in 29 U.S.C. 1102(b)(3) that every plan specify a procedure for amending the plan. 514 U.S. at 78-81. The Court remanded for the lower courts to decide whether the appropriate company officials had approved the new provision in the SPD. *Id.* at 85.

The Court in *Curtiss-Wright* did not address whether the new provision was a valid amendment, much less hold, as petitioners suggest, that it would violate plan amendment requirements to determine benefits based on the terms of an SPD rather than less favorable terms in other documents. At least ten courts of appeals have held that the SPD can trump the formal plan instrument in appropriate circumstances, see *Burstein*, 334 F.3d at 378 & n.18, and none has viewed *Curtiss-Wright* as an impediment to that holding. The conclusion that the SPD may supersede inconsistent terms in other documents presents no conflict with *Curtiss-Wright* because that conclusion does not rest on the theory that the SPD has amended the plan. Instead, it rests on the statutory specification that the SPD is itself a central plan document that must accurately inform participants of their benefits. Accordingly, the administrator cannot give effect to less favorable terms that conflict with the SPD without violating ERISA's command that fiduciaries act in accordance with governing plan documents and ERISA's requirements.

2. A reliance requirement would also be contrary to the contract and trust law underpinnings of ERISA.

Reliance is not required to enforce rights under a contract, including a contract governing compensation for employment, and giving controlling effect to the SPD when it augments rights described in less accessible documents is consistent with the prevailing rule applicable to group insurance policies. See pp. 16-17, *supra*. Nor is there any general requirement that a beneficiary prove reliance to recover for breach of trust. See Restatement § 205, at 458.[6] Although a beneficiary ordinarily may recover damages for breach of trust only if he suffered a loss, the burden generally shifts to the trustee to disprove the loss once the beneficiary has established a prima facie case. *Bogert* § 871, at 156-157. That rule supports the "likely harm" approach rather than a reliance requirement.[7]

3. A reliance requirement would also undermine ERISA's purposes, particularly its goal of ensuring that

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[6] As petitioners note (Br. 23), reliance may be required for certain breach-of-trust claims that are tantamount to fraud claims. But there is also support for presuming reliance in fraud claims against a fiduciary. See, *e.g.*, *Edmunds* v. *Valley Circle Estates*, 20 Cal. Rptr. 2d 701, 708 (Ct. App. 1993); *Watts* v. *Cumberland County Hosp. Sys., Inc.*, 343 S.E.2d 879, 884 (N.C. 1986); *Basile* v. *H&R Block, Inc.*, 777 A.2d 95, 107-108 (Pa. Super. Ct. 2001).

[7] Because ERISA is based on contract and trust law, not tort law, petitioners' invocation (Br. 28-31) of the torts of negligent and fraudulent misrepresentation is mistaken. Moreover, those torts are not analogous to a benefits claim based on an SPD that conflicts with other plan documents. A conflicting SPD is not an extra-contractual misrepresentation of plan terms; it is itself a statement of those terms. In any event, in statutory actions based on misrepresentation, this Court has rejected an affirmative reliance requirement when it would be inconsistent with the statutory scheme. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 245-246 (1988); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 153 (1972); see also *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 641-642 (2010). That is the case here.

participants and their beneficiaries receive the benefits promised to them. Beneficiaries would frequently be unable to prove reliance—especially beneficiaries of deceased participants who are unlikely to have evidence that the participants actually read the SPD and acted differently in response. *E.g.*, *Branch* v. *G. Bernd Co.*, 955 F.2d 1574, 1579-1580 & n.2 (11th Cir. 1992). At the same time, employers and administrators would have little incentive to ensure the accuracy of SPDs, which would frustrate ERISA's goal that participants understand their benefits.

Requiring individualized proof of reliance would also undermine ERISA's goals of promoting efficiency, predictability, and uniformity in plan administration. A reliance requirement may preclude class treatment of SPD benefit claims, see *Heffner* v. *Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1340 (11th Cir. 2006), and cause benefits under a single plan to vary based on the memories of individual participants and their ability to document their actions in response to statements in the SPD.

4. Finally, a reliance requirement would produce the anomalous result that ERISA "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone*, 489 U.S. at 114. Before ERISA, participants could recover benefits based on summaries of plan provisions under a contract law theory. *E.g.*, *Miller* v. *Dictaphone Corp.*, 334 F. Supp. 840, 842 (D. Or. 1971); *Gould* v. *Continental Coffee Co.*, 304 F. Supp. 1, 3 (S.D.N.Y. 1969).[8] Partici-

[8] In those pre-ERISA actions, courts generally allowed underlying documents to prevail over a summary if the summary stated that they would control. *E.g.*, *Voigt* v. *South Side Laundry & Dry Cleaners, Inc.*, 128 N.W.2d 411, 412-413 (Wis. 1964). Most courts, however, do not per-

pants could also recover benefits based on an administrator's failure to disclose necessary information without showing detrimental reliance. *E.g., Kosty* v. *Lewis*, 319 F.2d 744, 749 (D.C. Cir. 1963), cert. denied, 375 U.S. 964 (1964). Congress enacted ERISA's SPD requirements to give employees additional protection against "misleading or incomprehensible" descriptions of benefits and eligibility requirements in plan summaries. *Senate Report* 11; H.R. Rep. No. 533, 93d Cong., 1st Sess. 8 (1973). It would therefore make scant sense to interpret ERISA as increasing the burdens on participants seeking to recover benefits based on an SPD.

C. Participants May Sue Under ERISA Section 502(a)(1)(B) To Recover Benefits Based On An SPD

Petitioners also contend (Br. 13-24) that this Court should reverse the judgment below because participants may recover benefits based on an SPD only under ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3), and the courts below awarded benefits under Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B). That issue is not properly before this Court. Petitioners did not raise it in either the court of appeals or their certiorari petition, which sought review only of the question "[w]hether a showing of 'likely harm' is sufficient to entitle partici-

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mit a group insurance contract to trump a certificate of insurance even if the certificate states that it is subject to the group policy, because the insured is likely to see only the certificate. See 16 *Williston* § 49:26, at 140. Most courts of appeals have likewise concluded that, because the SPD is the only document a participant is likely to see, and ERISA requires it to be accurate, the SPD controls over conflicting terms in underlying documents even if the SPD states, as here, J.A. 922a, 938a, that the underlying documents control. See, *e.g.*, *Burstein*, 334 F.3d at 379; *Heidgerd*, 906 F.2d at 908; but see *Pisciotta* v. *Teledyne Indus., Inc.*, 91 F.3d 1326, 1331 (9th Cir. 1996) (per curiam).

pants * * * to recover benefits" based on an SPD. Pet. i. Whether participants may sue under Section 502(a)(1)(B) is a conceptually different issue, not fairly included in that question. Accordingly, the Court should not address the Section 502(a)(1)(B) issue. See *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *United States Philips Corp.*, 510 U.S. 27, 30-32 (1993) (per curiam); *Sullivan* v. *Louisiana*, 508 U.S. 275, 278 n.* (1993).

If the Court does reach the issue, it should hold, as indicated in *Kennedy*, 129 S. Ct. at 875, that participants may sue under Section 502(a)(1)(B) to recover benefits based on plan terms described in an SPD. That section authorizes a participant to sue "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. 1132(a)(1)(B). In light of the directive in 29 U.S.C. 1104(a)(1)(D) that administrators must follow the "documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]," the phrase "the terms of the plan" in Section 502(a)(1)(B) encompasses terms contained in the governing documents (including the SPD) and consistent with ERISA's provisions.

This Court's decisions reflect that understanding. The Court has stated that Section 502(a)(1)(B) "specifically provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims." *Varity*, 516 U.S. at 512. And, in *Unum Life Ins. Co. of Am.* v. *Ward*, 526 U.S. 358 (1999), the Court held that a state insurance law provision, saved from preemption under ERISA, "effectively create[d] a mandatory contract term" that overrode any contrary plan terms. *Id.* at 374, 376-377 (citation omit-

ted). The Court concluded that the participant's claim was one "to recover benefits due * * * under the terms of his plan," even though the state insurance law provision "supplied the relevant rule of decision." *Id.* at 377. That conclusion applies with even greater force to a claim for benefits based on terms in an SPD that take precedence over contrary terms in other plan documents, because an SPD, unlike a state insurance law, is itself a plan document. Accordingly, its terms, when they control over contrary terms in other documents, are "the terms of the plan," 29 U.S.C. 1132(a)(1)(B), and a suit seeking benefits based on those terms is properly brought under Section 502(a)(1)(B).

Indeed, even if the "terms of the plan" did not include the terms of the SPD, a suit alleging that an SPD controls over inconsistent plan terms in other documents would fall within Section 502(a)(1)(B) because it seeks "to enforce [a participant's] rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. 1132(a)(1)(B). That is because a court, in deciding the effect of the SPD on other expressions of the plan's terms, will necessarily decide the rights the participant has under the terms of the plan and clarify his rights under those terms to future benefits.

Channeling suits seeking benefits based on an SPD through Section 502(a)(1)(B) also best effectuates ERISA's purposes. Participants generally must exhaust administrative remedies before suing under Section 502(a)(1)(B), see *Communications Workers* v. *AT&T Co.*, 40 F.3d 426, 431-432 (D.C. Cir. 1994), but they generally may sue under Section 502(a)(3) without exhausting those remedies, see *Smith* v. *Sydnor*, 184 F.3d 356, 364 (4th Cir. 1999), cert. denied, 528 U.S. 1116 (2000).

Requiring exhaustion promotes efficiency in plan administration by giving administrators an opportunity to address claims in the first instance, possibly eliminating the need for judicial involvement. At the same time, participants who pursue their claims administratively are protected by DOL's claims regulation, 29 C.F.R. 2560.503-1, which ensures them a full and fair review.

In addition, Section 502(a)(1)(B) provides the most appropriate remedies for such suits. It allows participants "to recover benefits due" and to "clarify * * * rights to future benefits" under the plan. 29 U.S.C. 1132(a)(1)(B). Those remedies are exactly what plaintiffs seek when they sue for benefits based on an SPD. Section 502(a)(3), in contrast, is a "safety net" offering "appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Varity*, 516 U.S. at 512. Its equitable remedies may or may not be adequate for claims seeking to enforce the terms in the SPD.[9] Such claims are largely contract-based, demanding benefits promised in one of the central "documents and instruments governing the plan," 29 U.S.C. 1104(a)(1)(D), and they should be enforceable under Section 502(a)(1)(B).

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[9] Some courts have narrowly construed the equitable relief available under Section 502(a)(3). *E.g.*, *Callery* v. *United States Life Ins. Co.*, 392 F.3d 401, 404-408 (10th Cir. 2004) (injunction requiring payment of benefits to remedy failure to provide SPD not available), cert. denied, 546 U.S. 812 (2005). Properly construed, however, that relief may include plan reformation or injunctions requiring payment of benefits. *E.g.*, *Varity,* 516 U.S. at 495, 515; *Nechis* v. *Oxford Health Plans, Inc.*, 421 F.3d 96, 103 (2d Cir. 2005); *Mathews* v. *Chevron Corp.*, 362 F.3d 1172, 1185-1186 (9th Cir. 2004).

D. The Lower Courts Correctly Applied The "Likely Harm" Standard

Although the formal instruments establishing petitioners' cash balance plan provided for lengthy "wear away" periods during which some employees would work without accruing additional benefits, the SPDs and SMM indicated that all participants would accrue additional benefits continuously under the new plan, without "wear away." Applying the "likely harm" standard, the district court appropriately treated the SPDs and SMM as authoritative expressions of the plan's terms, and the court of appeals correctly affirmed that decision.

The district court correctly determined that respondents established likely harm from petitioners' failure to adhere to the SPDs and SMM. As the court explained, those documents "'likely, and quite reasonably, led plan participants to believe' that wear away was not a likely result of the transition" to the new plan. Pet. App. 136a (citation omitted). The SPDs and SMM thus likely led reasonable participants to expect materially more favorable benefits than those provided by the formal plan instruments, under which "some CIGNA employees' pension benefits did not grow for several years as a result" of "wear away." *Id.* at 123a. Pension benefits are an important part of an employee's compensation package, and a reasonable employee would view the fact that he would be working for extended periods without accruing additional benefits as an important feature of a pension plan.

Although respondents were not required to establish that they read and relied on the SPDs and SMM, CIGNA's own survey showed that 92% of responding participants thoroughly read the SMM. J.A. 895a. And the district court found that the statements in the SPDs

and SMM deprived participants of the opportunity to take timely action in response to the conversion, including looking for other work or protesting when the new plan was implemented, Pet. App. 137a, which had led other companies to revise or revoke similar conversions, *id.* at 112a-114a.

The district court also correctly concluded that petitioners failed to show that participants were not actually harmed by the failure to adhere to the promises in the SPDs and the SMM. Petitioners introduced no evidence that any participant had read the conflicting formal plan instruments, which were not circulated to employees. And petitioners failed to show that they distributed any other materials to employees making clear that, contrary to the SPDs and SMM, the new plan would include "wear away." Pet. App. 133a; cf. *Pierce* v. *Security Trust Life Ins. Co.*, 979 F.2d 23, 30 (4th Cir. 1992) (per curiam) (participants suffered no "prejudice" when corrected SPDs were issued before the discrepancy between prior SPDs and the underlying documents had any adverse effect). Petitioners did not call any witnesses to show that, despite the SPDs, some employees understood that they would be working without accruing additional benefits, and petitioners declined to engage in discovery on the issue. See Pet. App. 166a; cf. *Govoni* v. *Bricklayers, Masons & Plasterers Int'l Union, Local No. 5 Pension Fund*, 732 F.2d 250, 252-253 (1st Cir. 1984) (Breyer, J.) (employee suffered no "possible prejudice" from SPD's failure to disclose limit on eligibility when he was actually aware of that limit before he retired). The district court therefore reasonably decided that petitioners should not get an additional opportunity to show the possible existence of employees who expected the plan to provide materially less favor-

able benefits than those promised by the SPDs and SMM. Pet. App. 166a. Accordingly, the court appropriately ordered petitioners to give respondents what those documents promised—and what ERISA now requires all participants in cash balance conversions to receive, see 29 U.S.C. 1054(b)(5)(B)(iii)—the provision of benefits without "wear away."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2010

APPENDIX

1. Section 1002 of Title 29 of the United States Code provides in pertinent part:

Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan. An applicable voluntary early retirement incentive plan (as defined in section 457(e)(11)(D)(ii) of Title 26) making payments or

supplements described in section 457(e)(11)(D)(i) of Title 26, and an applicable employment retention plan (as defined in section 457(f)(4)(C) of Title 26) making payments of benefits described in section 457(f)(4)(A) of Title 26, shall, for purposes of this subchapter, be treated as a welfare plan (and not a pension plan) with respect to such payments and supplements.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * * * *

2. Section 1022 of Title 29 of the United States Code provides:

Summary plan description

(a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by

the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(b) The summary plan description shall contain the following information: The name and type of administration of the plan; in the case of a group health plan (as defined in section 1191b(a)(1) of this title), whether a health insurance issuer (as defined in section 1191b(b)(2) of this title) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; 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; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this chapter and the Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan (as defined in section 1191b(a)(1) of this title), the remedies available under

the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

3. Section 1024 of Title 29 of the United States Code provides in pertinent part:

* * * * *

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Not-

withstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a) of this title (other than a material reduction in covered services or benefits provided in the case of a group health plan (as defined in section 1191b(a)(1) of this title)), a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan. If there is a modification or change described in section 1022(a) of this title that is a material reduction in covered services or benefits provided under a group health plan (as defined in section 1191b(a)(1) of this title), a summary description of such modification or change shall be furnished to participants and beneficiaries not later than 60 days after the date of the adoption of the modification or change. In the alternative, the plan sponsors may provide such description at regular intervals of not more than 90 days. The Secretary shall issue regulations within 180 days after August 21, 1996, providing alternative mechanisms to delivery by mail through which group health plans (as so defined) may notify participants and beneficiaries of material reductions in covered services or benefits.

(2) The administrator shall make copies of the latest updated summary plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was

established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 1023(b)(3) of this title and such other material (including the percentage determined under section 1023(d)(11) of this title) as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary,[1] plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

* * * * *

[1] So in original. Comma probably should not appear

4. Section 1104 of Title 29 if the United States Code provides in pertinent part:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

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5. Section 1132 of Title 29 of the United States Code provides in pertinent part:

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * * * *

6. Section 2520.102-2 of Title 29 of the Code of Federal Regulations provides in pertinent part:

Style and format of summary plan description.

(a) *Method of presentation.* The summary plan description shall be written in a manner calculated to be understood by the average plan participant and shall be

sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan. In fulfilling these requirements, the plan administrator shall exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan. Consideration of these factors will usually require the limitation or elimination of technical jargon and of long, complex sentences, the use of clarifying examples and illustrations, the use of clear cross references and a table of contents.

(b) *General format.* The format of the summary plan description must not have the effect to misleading, misinforming or failing to inform participants and beneficiaries. Any description of exception, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations. The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of benefits, provided that adjacent to the benefit description the page on which the restrictions are described is noted.

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