No. 09-804

IN THE
Supreme Court of the United States

CIGNA CORPORATION AND CIGNA PENSION PLAN,
Petitioners,
v.
JANICE C. AMARA ET AL., individually and on behalf of all others similarly situated,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a showing of "likely harm" is sufficient to entitle participants in or beneficiaries of an ERISA plan to recover benefits based on an alleged inconsistency between the explanation of benefits in the Summary Plan Description or similar disclosure and the terms of the plan itself.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Gisela R. Broderick and Annette S. Glanz were plaintiffs below and are respondents in this Court.

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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JURISDICTION

The court of appeals filed its opinion on October 6, 2009. The petition for a writ of certiorari was filed on January 4, 2010, and granted on June 28, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, are set forth in the appendix to this brief.

STATEMENT

In 1998, CIGNA Corporation transitioned to a new form of pension plan for its employees. Although the transition complied with all of ERISA's substantive requirements, the district court found that CIGNA had failed to provide an accurate description of some aspects of the new plan in its summary plan description ("SPD")—a document that provides plan participants with a concise overview of plan benefits. Without determining whether *any* participants in the plan had actually read—let alone relied on—the SPD's descriptions of their benefits, the court ordered CIGNA to recalculate benefits for

each of the 27,000 class members. The Second Circuit summarily affirmed.

According to the courts below, plaintiffs seeking to recover benefits based on an inconsistency between an SPD and the plan itself have no obligation to demonstrate that they detrimentally relied on the SPD's description of their benefits (or even that they were aware of that description at all). That conclusion cannot be reconciled with ERISA's text, common-law origins, or statutory objectives. The decision below should be reversed.

1. ERISA does not "require[ ] employers to establish employee benefits plans" or "mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). It instead "encourag[es] the formation" of such plans by establishing a uniform legal framework that facilitates cost-effective plan administration (*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)) and that "minimize[s] the administrative and financial burden of complying with conflicting [state-law] directives." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (internal quotation marks omitted).

The protections that ERISA affords plan participants reflect the "careful balanc[e]" that Congress struck between the dual statutory objectives of protecting plan participants and promoting plan formation. *Pilot Life*, 481 U.S. at 54. ERISA contains a "carefully crafted and detailed enforcement scheme" that "resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254, 262 (1993). For example, ERISA authorizes a

plan participant to bring a civil action "to recover benefits due to him under the terms of his plan" (29 U.S.C. § 1132(a)(1)(B)), but does not authorize awards of extra-contractual damages. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985). ERISA also restricts plan participants to the remedies afforded by ERISA itself by expressly preempting all state-law claims that "relate to any employee benefit plan." 29 U.S.C. § 1144(a).

ERISA contains several disclosure provisions that are designed to ensure that participants understand their benefits and the eligibility requirements they must satisfy. ERISA requires each covered plan to be "established and maintained pursuant to a written instrument" that "specif[ies] the basis on which payments are made to and from the plan." 29 U.S.C. § 1102(a)(1), (b)(4); *Kennedy v. Plan Adm'r for Dupont Sav. & Inv. Plan*, 129 S. Ct. 865, 875 (2009). ERISA further states that plan sponsors must make the plan "available for examination by any plan participant or beneficiary" and furnish a copy of the plan to a participant or beneficiary upon request (at a "reasonable charge to cover the cost"). 29 U.S.C. § 1024(b)(2), (4).

Because plans are generally voluminous documents written in technical legal terms, ERISA also requires plan administrators to provide participants with SPDs that summarize the terms of the plan in plain English. 29 U.S.C. §§ 1022(a), 1024(b). SPDs must be "written in a manner calculated to be understood by the average plan participant," and must be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." *Id.* § 1022(a). ERISA further requires that a plan provide participants with a Summary of Material Modi-

fications ("SMM") whenever material changes are made to the plan or to the information that the plan is required to disclose in the SPD. *Id.* ERISA's "regulations regarding the content of SMMs and SPDs [are] virtually identical." Pet. App. 115a n.33.

2. CIGNA sponsors an ERISA-governed pension benefit plan for its employees. In 1998, CIGNA transitioned from a traditional defined benefit pension plan formula, known as "Part A," to a cash balance pension plan formula, known as "Part B." Pet. App. 16a-17a.

Under CIGNA's traditional defined benefit pension plan, employees earned benefits over time based on their service and salary. Pet. App. 15a. Upon retirement, they received an annuity that provided them with an annual benefit payable for life. *Id.* at 16a. Under CIGNA's cash balance pension plan, employees still earn benefits over time based on service and salary, but—instead of being expressed in the form of an annual benefit—the benefits are expressed as credits to a hypothetical "account" for each employee. *Id.* at 19a-20a. The account balances increase based on annual service and salary credits, as well as quarterly interest credits; upon retirement, employees have the option of taking their benefit as a lump sum or in the form of an annuity payable for life. *Id.* at 21a-22a.

CIGNA is one of the "hundreds of employers [that] have adopted" cash balance plans since they "were introduced in the mid-1980s." Pet. App. 11a. Like the CIGNA Plan, most of these cash balance plans are the result of lawful "conversions from traditional defined benefit plans." *Id.* at 13a. There are many factors that can lead an employer to transition to a cash balance plan. As the district court ex-

plained, "cash balance plans are not inherently more or less costly than traditional defined benefit plans," and, "depending on how the plan is configured, . . . may provide advantages for both employees and employers." *Id.* at 11a. For example, CIGNA's cash balance plan places less weight than its traditional defined benefit plan on employees' salaries at the time of retirement, which permits employees to accrue retirement benefits at a more steady rate throughout their careers. *Id.*

CIGNA transitioned from a traditional defined benefit plan to a cash balance plan by converting each plan participant's Part A accrued benefit into a lump sum and crediting that amount to each participant's individual Part B account as an opening balance. Pet. App. 19a. Participants thereafter accrue additional benefits based on annual pay credits and quarterly interest credits. *Id.* at 20a-21a. CIGNA also guarantees participants that if their Part B benefit is less valuable at the time they decide to receive their pensions than their Part A accrued benefit at the time of the transition, they will receive their more valuable Part A benefit as a "minimum benefit." *Id.* at 22a.

In December 1997, CIGNA issued an SMM that informed participants about the forthcoming transition to a cash balance plan and that "contained detailed information about the calculation of opening balances." Pet. App. 34a. In October 1998, CIGNA issued the SPD for Part B, which it reissued in nearly identical form in September 1999. *Id.* at 39a. Among other things, the SPD provided participants with information about "eligibility; how breaks in service affect eligibility; how the cash balance account grows, including how pay and interest credits accrue; when benefits are paid; [and] how benefits

are paid. . . . It also informed employees that they could obtain a copy of the Plan from the plan administrator." *Id.* at 39a-40a.

In addition to these companywide communications, CIGNA also provided each participant with a personalized Total Compensation Report in 1998, which showed the participant's actual opening account balance and the manner in which that balance was calculated. Pet. App. 38a-39a. Thereafter, CIGNA provided each participant with annual account statements showing the participant's year-end account balance and its year-to-year growth. *Id.* at 39a.

3. In 2001, respondents filed suit against CIGNA in the United States District Court for the District of Connecticut under ERISA § 502, 29 U.S.C. § 1132. On behalf of a putative class of participants in the CIGNA Pension Plan, respondents alleged that Part B of the Plan violated numerous substantive requirements of ERISA and that CIGNA had violated certain of ERISA's disclosure requirements during the transition from its traditional defined benefit pension plan to its cash balance plan. Pet. App. 7a. Respondents sought relief under both § 502(a)(1)(B), which authorizes a plaintiff to "recover benefits due to him under the terms of his plan" (*id.* § 1132(a)(1)(B)), and § 502(a)(3), which authorizes "other appropriate equitable relief . . . to redress . . . violations" of ERISA. *Id.* § 1132(a)(3)(B). The district court certified a class of approximately 27,000 plan participants. Pet. App. 41a, 47a n.9.

After a bench trial, the district court concluded that the terms of CIGNA's cash balance plan were lawful and rejected respondents' arguments that the Plan is age-discriminatory and violates ERISA's non-

forfeiture and anti-backloading rules. Pet. App. 8a. The court emphasized that "ERISA gives employers substantial leeway in designing a pension plan," and that "CIGNA's Plan complies with the relevant statutory provisions." *Id.*

The district court also determined, however, that "CIGNA's summary plan descriptions . . . were inadequate under ERISA" because "the company did not provide its employees with the information they needed to understand the conversion from a traditional defined benefit plan to a cash balance plan and its effect on their retirement benefits." Pet. App. 8a, 9a.

The district court found that the CIGNA Plan's SPDs were deficient because they failed to disclose to participants a phenomenon known as "wear away." Pet. App. 123a. "Wear away" is attributable to the interaction between the Plan's opening account balance and minimum benefit provisions. *Id.* at 24a. Specifically, although participants earn additional pay and interest credits to their Part B account balances each year they continue working, some participants might have account balances that are less valuable than their Part A minimum benefit for some period of time due to falling interest rates, mortality assumptions, or the protection of subsidized early retirement benefits previously earned under Part A. *Id.* at 22a-25a.

The district court held that this "wear away" phenomenon was not inconsistent with any of ERISA's substantive requirements. Pet. App. 8a. It nevertheless concluded that "CIGNA had a duty to inform plan participants of the possibility of wear away." *Id.* at 123a. According to the district court,

CIGNA violated this duty by failing to disclose "wear away" in its SPDs. *Id.*[1]

The district court rejected CIGNA's argument that, even if its SPDs were deficient, respondents were "not entitled to relief because they ha[d] failed to demonstrate injury" attributable to those deficiencies. Pet. App. 131a. Invoking the Second Circuit's decision in *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004), the district court stated that recovery is appropriate where "a plan participant or beneficiary was *likely* to have been harmed as a result of a deficient SPD" and that "[w]here a participant makes this initial showing . . . the employer may rebut it through evidence that the deficient SPD was in effect a harmless error." Pet. App. 132a (quoting *Burke*, 336 F.3d at 113) (emphasis in *Burke*). Emphasizing the "broad nature of 'likely harm,'" the court found that respondents had made their threshold showing because CIGNA's SPDs "likely, and quite reasonably, led plan participants to believe that wear away was not a likely result of the transition to Part B." *Id.* at 132a, 136a (internal quotation marks omitted).

To rebut this presumption of "likely harm," CIGNA demonstrated that, "even if [respondents] had received all of the information they claim should have been included in the [SPDs], no Class member's benefits under Part B would have changed" (Pet. App. 133a) because the terms of the Plan do not af-

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[1] The district court also found that the SPDs were deficient because they purportedly led plan participants to believe that all their Part A benefits would be preserved in the opening Part B account balance or as part of their minimum benefit, when in fact early retirement benefits were not preserved under some circumstances. Pet. App. 128a-30a.

ford CIGNA's employees the authority to disapprove plan amendments. CIGNA further demonstrated that participants were provided annual personalized statements notifying them of their actual account balances, and that participants never received less than their account balances. *Id.* at 22a, 39a.

The district court nevertheless concluded that CIGNA had failed to defeat the "likely harm" presumption because it was possible that the deficiencies in the SPDs "deprived [respondents] of the opportunity to take timely action," including "protesting at the time Part B was implemented, leaving CIGNA for another employer with a more favorable pension plan, or filing a lawsuit like this one." Pet. App. 137a (internal quotation marks omitted).

The district court then ordered briefing on remedial issues. CIGNA again argued that *each* "'plan participant should be required to prove detrimental reliance before being entitled to benefits based on a flawed SPD.'" Pet. App. 165a n.1. The district court rejected CIGNA's individualized remedial approach on the ground that it was "contrary to Second Circuit precedent." *Id.* (citing *Burke*, 336 F.3d at 112). The district court thus declined to "distinguish the named Plaintiffs from the rest of the Class," or "require an individualized showing such as that requested by CIGNA, *even from the named Plaintiffs themselves*." *Id.* at 164a (emphasis added). According to the district court, "all class members were affected equally and in a similar manner" by the deficient SPDs (*id.* at 165a)—even those "employees who received *but did not read* the misleading notices and disclosures." *Id.* at 167a (emphasis added).

Applying its undifferentiated, class-wide remedial approach, the district court concluded that "the

terms of Part B ha[d] been . . . modified by CIGNA's October 1998 and September 1999 Summary Plan Descriptions," and ordered CIGNA to recalculate the class's benefits using a so-called "A+B" approach. Pet. App. 218a. Under that methodology, a participant will receive "all of her Part A benefits in the form those benefits were previously offered under Part A, plus all the benefits she accrued under Part B" (*id.* at 196a), without regard to the contrary terms of the Plan itself. The district court held that this relief was proper under § 502(a)(1)(B) of ERISA because it "constitute[s] benefits under the terms of the plan." *Id.* at 181a. The court therefore ruled that it "need not consider whether any relief . . . would also be available under § 502(a)(3)." *Id.* at 182a.[2]

"[R]ecogniz[ing] that the benefits awarded by [its] opinion are substantial, and that the law on which they are based is anything but settled," the district court *sua sponte* stayed its decision pending appeal. Pet. App. 219a.

The court of appeals summarily affirmed "for substantially the reasons stated in" the district court's opinions. Pet. App. 4a.

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[2] In crafting this relief under § 502(a)(1)(B), the district court pointed to deficiencies in both the SPDs and the SMM, but made clear that, in the absence of the deficient SPDs, it would not have held that the terms of the Plan had been "modified" to provide for an "A+B" approach. Pet. App. 218a; *see also id.* at 200a ("the Court is reluctant . . . to reform the terms of the plan in conformity with the SMM").

SUMMARY OF ARGUMENT

To recover benefits based on an inconsistency between an SPD and the terms of an ERISA plan itself, a plaintiff must prove that she detrimentally relied on the SPD. Because the Second Circuit permitted the 27,000 class members to recover benefits based on CIGNA's SPDs without requiring any of them to make a showing of detrimental reliance, the decision below should be reversed.

I. As a threshold matter, § 502(a)(1)(B) of ERISA, which authorizes a participant or beneficiary to sue to "recover benefits due . . . *under the terms of [the] plan*," does not authorize a suit to recover benefits described in an SPD but not in the plan itself. 29 U.S.C. § 1132(a)(1)(B) (emphasis added). As then-Judge Alito explained in *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310 (3d Cir. 1991), the plain language of § 502(a)(1)(B) permits recovery only for benefits promised in a "plan," and an SPD is not a "plan." *Id.* at 1316. Moreover, an SPD may not amend a plan unless the plan's amendment procedures so permit. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 79 (1995).

Participants and beneficiaries, however, may be able to recover for a deficient SPD under ERISA § 502(a)(3), which authorizes "appropriate equitable relief . . . to redress . . . violations" of ERISA. 29 U.S.C. § 1132(a)(3)(B). In appropriate cases, recovery may be available under either a breach-of-fiduciary-duty theory (*Varity Corp. v. Howe*, 516 U.S. 489 (1996)) or under a theory of equitable estoppel. Both theories require the plaintiff to make a showing of detrimental reliance. *See*, *e.g.*, *Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 571 (3d Cir. 2006); *Mello*

v. Sara Lee Corp., 431 F.3d 440, 444-45 (5th Cir. 2005).

II. Even if a participant or beneficiary could recover benefits based on an inconsistency between an SPD and the plan under ERISA § 502(a)(1)(B), a showing of detrimental reliance would still be required.

A. ERISA's statutory language limits recovery to plaintiffs who actually looked to the SPD to learn about their benefits. Indeed, an SPD is designed to "apprise . . . participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). There is no remedy under ERISA for plaintiffs who did not detrimentally rely upon an inconsistency between an SPD and the plan because those plaintiffs did not use the SPD to "apprise" themselves of their benefits under the plan.

B. Moreover, the common-law causes of action most analogous to respondents' claims—negligent and intentional misrepresentation—included a detrimental-reliance requirement. *See* Restatement (Second) of Torts §§ 552(1), 525. And, even if respondents' suit is analogized to a contract action, respondents have effectively pleaded promissory estoppel—a gratuitous promise outside the terms of the written contract—which also requires detrimental reliance.

C. ERISA's policy objectives provide further support for the detrimental-reliance requirement. If a participant or beneficiary has suffered an injury by relying on an inconsistency between an SPD and a plan, she should be entitled to recover. But plaintiffs who never even read the flawed SPD, or who read the SPD but did not alter their conduct based on it, should not receive a windfall recovery from plan as-

sets. Any other rule would needlessly deplete the assets available to fund benefits for all other participants and beneficiaries, encourage the production of lengthy and impossible-to-decipher SPDs, and discourage companies from offering benefit plans in the first place.

The Second Circuit has never attempted to reconcile its "likely harm" standard with the text of ERISA or with the common-law actions most analogous to respondents' claims. According to the Second Circuit, that standard is required by ERISA because "individual employee[s]" are generally "less equipped to absorb the financial hardship of the employer's errors" than the plan itself. *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 113 (2d Cir. 2003). But financial resources alone provide no reason to redistribute a plan's finite assets to a plaintiff who has never even read an SPD and to do so at the expense of other participants and beneficiaries who must look to those same limited plan assets for their retirement benefits.

ARGUMENT

I. PLAINTIFFS CAN RECOVER BENEFITS BASED ON AN INCONSISTENCY BETWEEN AN SPD AND THE PLAN ONLY BY PROVING DETRIMENTAL RELIANCE IN A CAUSE OF ACTION UNDER ERISA § 502(a)(3).

The Second Circuit erred in permitting recovery under § 502(a)(1)(B) of ERISA, which authorizes suit only "to recover benefits due . . . under the terms of [the] plan" (29 U.S.C. § 1132(a)(1)(B)) because an SPD is not itself a "plan." Relief is potentially available to respondents only under ERISA § 502(a)(3), which authorizes "appropriate equitable relief . . . to redress . . . violations" of ERISA (*id.* § 1132(a)(3)(B)),

and which would require respondents to make a showing of detrimental reliance.

A. Plaintiffs Cannot Recover Benefits Based On An Inconsistency Between An SPD And The Plan Under ERISA § 502(a)(1)(B).

1. Although respondents brought suit under both § 502(a)(1)(B) and § 502(a)(3) of ERISA, the district court awarded relief only under § 502(a)(1)(B). Pet. App. 171a-72a, 197a. This Court has recognized that § 502(a)(1)(B) "is relatively straightforward": "If a participant or beneficiary believes that benefits promised to him *under the terms of the plan* are not provided, he can bring suit seeking provision of those benefits." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004) (emphasis added).

An SPD "is not a 'plan' within the meaning of Section 502(a)(1)(B)." *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1316 (3d Cir. 1991) (Alito, J.). ERISA defines a "plan" as "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," 29 U.S.C. § 1002(3), and requires a "plan" to "be established and maintained pursuant to a written instrument." *Id.* § 1102(a)(1). Here, the "written instrument" is the document entitled "CIGNA Pension Plan." *See* J.A. 396a, 427a.

"This definition clearly does not encompass a summary plan description" (*Gridley*, 924 F.2d at 1318), which ERISA separately defines as a document that "apprise[s] . . . participants and beneficiaries of their rights and obligations *under the plan*." 29 U.S.C. § 1022(a) (emphasis added). The plan embodied in the "written instrument" is "the original, as it

were, which the summary plan description excerpts and translates into language that may be imprecise because it is designed to be intelligible to lay persons." *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999) (Posner, J.). An SPD is no more a "plan" than a syllabus to one of this Court's opinions is itself an opinion. *See United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906).

ERISA's structure confirms this conclusion. The statute repeatedly treats an SPD as different from the "written instrument" under which "[e]very employee benefit plan shall be established and maintained." 29 U.S.C. § 1102(a)(1). Indeed, a number of provisions of ERISA would be nonsensical if an SPD were understood to be a document that is part of the "plan." *See*, *e.g.*, 29 U.S.C. § 1024(b)(2) ("The administrator shall make copies of the latest updated summary plan description . . . *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 . . . .") (emphasis added); *id.* § 1029(c) ("The Secretary may prescribe the format and content of the summary plan description . . . and any other report, statements or documents (*other than the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated*) which are required to be furnished or made available to plan participants and beneficiaries receiving benefits under the plan.") (emphasis added).

Moreover, ERISA assigns the responsibility for drafting and amending the plan and SPD to *different* entities. Creating and modifying the plan is the responsibility of the settlor (that is, the employer). *See*

Beck v. PACE Int'l Union, 551 U.S. 96, 101 (2007) ("[A]n employer's decision whether to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations.") (emphasis omitted); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries."). In contrast, publishing an SPD is a fiduciary function for which the plan administrator has exclusive responsibility. *See* 29 U.S.C. §§ 1021, 1022, 1024(b); *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) ("ERISA itself specifically requires administrators to give beneficiaries certain information about the plan."). Although an employer sometimes acts as both the plan sponsor and the plan administrator, the "employer's fiduciary duties under ERISA are implicated only when it acts in the latter capacity." *Beck*, 551 U.S. at 101.[3] The fundamental statutory distinction between plan composition and SPD production underscores that an action to recover benefits based on an SPD does not constitute an action for benefits under the "plan" within the meaning of § 502(a)(1)(B).

Nor may an SPD modify the terms of a plan, unless the plan's amendment procedures so provide. In *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), this Court unanimously held that an amendment to a plan is effective only if the amendment procedures specified in the plan are met. *Id.* at 79. In that case, the plan provided that only "the

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[3] The district court in this case determined that an individual not a party to the lawsuit was the specifically named "administrator" for the CIGNA Plan. Pet. App. 84a. The district court further found (over CIGNA's objection, *see id.* at 83a-89a) that CIGNA also was a "*de facto* administrator or co-administrator." *Id.* at 87a.

Company" could adopt amendments, and the SPD had been drafted by two employees who did not necessarily have authority to act on behalf of the company. *See id.* The Court held that the amendment procedure was valid and that, accordingly, "one must look *only* to '[t]he Company' and *not* to any other person" to determine if a valid amendment had been adopted. *Id.* The case was remanded to determine whether the employees' issuance of the SPD qualified as an amendment "by the Company" within the meaning of the plan. *Id.* at 85; *see also* 29 U.S.C. § 1102(b)(3) (requiring that every plan "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan"); *Inter-Modal Rail Emps. Ass'n v. Atchinson, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515-16 (1997) ("An employer may, of course, retain the unfettered right to alter its promises, but to do so it must follow the formal procedures set forth in the plan.").

In this case, there is no question that the SPDs could not have amended the CIGNA Plan because the Plan provides that only specifically enumerated parties may promulgate amendments; the plan administrator, who has exclusive responsibility for issuing SPDs, is not one of those parties. *See* J.A. 510a ("The Plan may be amended by: a resolution of the Board of Directors of CIGNA Corporation; a resolution by the People Resource Committee of the Board of Directors . . . or by a written instrument approved and executed by one or more duly authorized officers of CIGNA Corporation."); *see also id.* at 695a. Indeed, the SPDs explicitly state that they do not modify the Plan's terms and that the Plan—not the SPDs—controls in the event of any discrepancy *Id.* at 922a, 938a.

Because an SPD is not itself an ERISA plan, and because the SPDs in this case could not have amended the terms of the CIGNA Plan, respondents are not entitled to relief under ERISA § 502(a)(1)(B). Respondents are not seeking "to recover benefits due to [them] under the terms of [the] *plan*." 29 U.S.C. § 1132(a)(1)(B) (emphasis added); *see also Gridley*, 924 F.2d at 1318; *cf. Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985) (emphasizing statutory text's repeated use of the word "plan" in holding that a participant may not recover under ERISA § 502(a)(2) for injuries not to the plan itself). The "terms of [the] plan" are set out in the "written instrument" through which the CIGNA Plan was "established and maintained" (29 U.S.C. § 1102(a)(1)), and those terms do not entitle respondents to the additional benefits awarded by the district court. *See* J.A. 396a-538a.

The district court nevertheless held that the "terms of Part B have been . . . modified by CIGNA's October 1998 and September 1999 Summary Plan Descriptions." Pet. App. 218a; *see also id.* at 197a ("[T]hese representations have become terms of the Plan . . . ."). Although the district court did not provide an explanation for its conclusion, other courts have reasoned that, because "the SPD serves as a summary of the contract's (i.e., the plan document's) key terms . . . 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." *Burstein v. Ret. Account Plan for Emps. of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 381 (3d Cir. 2003); *see also Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458 (5th Cir. 2007).

That reasoning cannot be reconciled with *Curtiss-Wright*'s unambiguous holding that an SPD

cannot amend a plan unless the plan's terms so provide. 514 U.S. at 79. Moreover, these lower-court decisions create a striking anomaly: If publishing an inconsistent SPD can amend plan terms, then an SPD that provides *fewer* benefits than the plan or is otherwise disadvantageous to plan participants should also "supersede[ ] and modif[y]" the plan. In other words, if the phrase "benefits due . . . under the terms of [the] plan" in § 502(a)(1)(B) is read to include benefits under the SPD where the SPD is inconsistent with the plan, then the SPD should control both where it operates to the *benefit* and where it operates to the *detriment* of participants. Section 502(a)(1)(B) does not authorize an award of "benefits under the plan as set out in the written instrument, or as set out in the SPD if the SPD provides additional benefits to participants"—a one-way ratchet that finds no support in the text of the statute.

Courts authorizing such recovery under § 502(a)(1)(B) have also noted the potential harm to participants who have relied on SPDs that conflict with plan terms. *See Heidgerd v. Olin Corp.*, 906 F.2d 903, 907-08 (2d Cir. 1990); *McKnight v. So. Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985). That is undoubtedly an important concern, and clearly one that animates ERISA. But it is no basis to misread ERISA's remedial provisions. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 221 (2002) ("We will not attempt to adjust the carefully crafted and detailed enforcement scheme embodied in the text that Congress has adopted.") (internal quotation marks omitted). And, in any event, the concern with fairness—and particularly the one-way ratchet approach—fits far more comfortably with the principles of equity that under-

gird § 502(a)(3) than with a § 502(a)(1)(B) action for "benefits under [the] plan."

Furthermore, Congress has demonstrated that, where it wants a disclosure violation to modify the terms of an ERISA plan, it knows how to enact a statutory provision that provides such relief. In 2001, Congress amended ERISA to provide just such a remedy for defective § 204(h) notices, which alert participants to a change in a plan that will reduce the rate of future benefit accruals. That amendment provides that, in the case of an "egregious failure" to comply with the notice requirements of § 204(h), "the provisions of the applicable pension plan shall be applied as if such a plan amendment entitled all applicable individuals to the greater of (i) the benefits to which they would have been entitled without regard to such amendment, or (ii) the benefits under the plan with regard to such amendment." 29 U.S.C. § 1054(h)(6)(A). If Congress had intended to provide a comparable remedy for defective SPDs, it would have enacted a similar amendment to ERISA's SPD provisions.

B. In Appropriate Cases, Plaintiffs Can Recover Benefits Based On An Inconsistency Between An SPD And The Plan By Proving Detrimental Reliance Under ERISA § 502(a)(3).

1. ERISA's remedial scheme does not leave participants or beneficiaries who have relied on an inconsistency between an SPD and a plan without recourse. Section 502(a)(3) of ERISA authorizes "appropriate equitable relief . . . to redress . . . violations" of ERISA. 29 U.S.C. § 1132(a)(3)(B). An SPD that fails to correctly summarize plan terms is a violation of ERISA § 102(a)—which requires that an

SPD provide an "accurate" summary of a participant's "benefits and obligations" under the plan. *Id.* § 1022(a). A participant who has relied on an inaccurate SPD therefore may be entitled to "redress" under § 502(a)(3).

As this Court held in *Varity*, misrepresentations made to participants about their benefits are actionable as a claim for breach of fiduciary duty under § 502(a)(3). 516 U.S. at 493-94, 507-15. Following *Varity*, courts of appeals have recognized the availability of a breach-of-fiduciary-duty claim based on a misrepresentation in an SPD. *See*, *e.g.*, *Burstein*, 334 F.3d at 385-87. In this case, however, respondents expressly disclaimed any such theory of recovery. Pet. App. 43a n.6.

Moreover, some courts have held that § 502(a)(3) also authorizes a participant or beneficiary to bring suit under a promissory-estoppel or equitable-estoppel theory to recover for misleading written representations about plan benefits. *See*, *e.g.*, *Pell v. E.I. DuPont de Nemours & Co.*, 539 F.3d 292, 300 (3d Cir. 2008) (under § 502(a)(3), "[a] beneficiary can make out a claim for 'appropriate equitable relief' . . . based on a theory of equitable estoppel"); *Kannapien v. Quaker Oats Co.*, 507 F.3d 629, 636 (7th Cir. 2007) (same).[4]

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[4] These courts generally use the terms "promissory estoppel" and "equitable estoppel" interchangeably, although there is a difference that is arguably immaterial in this context. "Promissory is distinct from equitable estoppel in that the representation at issue is promissory rather than a representation of fact." *Black's Law Dictionary* 571 (7th ed. 1999) (internal quotation marks omitted). An SPD that misstates the terms of the plan might be considered a gratuitous promise of future benefits or a

Indeed, courts have explicitly recognized that, in appropriate cases, a plaintiff can invoke an estoppel-like theory under § 502(a)(3) based on an inconsistency between an SPD and the plan. In *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51 (1st Cir. 2001), for example, the First Circuit held, in an action under § 502(a)(3), that a plan summary is "binding on a plan administrator" as a result of "common law principles of estoppel." *Id.* at 55. Similarly, then-Judge Alito's opinion for the Third Circuit in *Gridley* acknowledged that a claim for benefits based on a deficient SPD could proceed as a promissory-estoppel action under § 502(a)(3), but ultimately concluded that the plaintiff had not satisfied the elements of such a claim. *See* 924 F.2d at 1318-20 & n.6. Here, however, respondents chose not to assert an estoppel claim.[5]

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misrepresentation of the fact of the terms of the plan. Either way, detrimental reliance is required. *See infra* at pg. 23.

[5] Not all breach-of-fiduciary duty and estoppel claims satisfy the requirements of § 502(a)(3). To obtain relief based on an equitable theory of recovery under § 502(a)(3), a plaintiff must demonstrate that "the nature of the underlying remedies sought" is also "equitable" in nature. *Sereboff v. Mid Atl. Med. Servs.*, 547 U.S. 356, 363 (2006) (internal quotation marks omitted). The availability of relief for a deficient SPD under § 502(a)(3) therefore depends on whether the remedy sought was available in courts of equity "[i]n the days of the divided bench" (*id.* at 362 (internal quotation marks omitted)), as well as on the specific nature of the misrepresentation at issue and its impact on a particular participant. *Compare Pell*, 539 F.3d at 305-10 (holding that an injunction requiring the calculation of future benefits under a formula different from the one that would have applied in the absence of a misrepresentation and an award of past-due pension benefits under the new formula were forms of equitable relief available under § 502(a)(3)), *with*

2. Under ordinary principles of equity, an action for redress of a misrepresentation under ERISA § 502(a)(3)—whether framed as breach of fiduciary duty or equitable estoppel—requires a showing of detrimental reliance. *See*, *e.g.*, *Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 571 (3d Cir. 2006) ("Detrimental reliance on a material misrepresentation made by the defendant is a necessary element of an ERISA breach of fiduciary duty claim."); *Mello v. Sara Lee Corp.*, 431 F.3d 440, 444-45 (5th Cir. 2005) (equitable estoppel requires "reasonable and detrimental reliance upon the representation").

The reliance requirement is consistent with this Court's description of these equitable actions. The Court has explained, for example, that an "essential element of any estoppel is detrimental reliance on the adverse party's misrepresentations." *Lyng v. Payne*, 476 U.S. 926, 935 (1986) (citing 3 J. Pomeroy, Equity Jurisprudence § 805, at 192 (S. Symons ed. 1941)). More broadly, it "is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy." *Lemon v. Kurtzman*, 411 U.S. 192, 203 (1973).

The Second Circuit's virtual-strict-liability standard, which permits a plaintiff to prevail on the thinnest showing of "likely harm" (such as the possibility that the plaintiff could have protested a lawful plan amendment not disclosed in an SPD), cannot be reconciled with these settled principles of equity juris-

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Eichorn v. AT&T Corp., 484 F.3d 644, 654-56 (3d Cir. 2007) (holding that an injunction requiring an adjustment of "pension records retroactively to create an obligation to pay the plaintiffs more money, both in the past and going forward," was not available under § 502(a)(3)).

prudence. Thus, if the Second Circuit had evaluated whether respondents were entitled to recovery under § 502(a)(3), it would have been error for it to do so under the "likely harm" standard.

In any event, respondents did not plead breach of fiduciary duty or equitable estoppel in this case, and made no effort to satisfy the detrimental-reliance requirement. For that reason, this Court should reverse the judgment of the court of appeals because respondents did not pursue the only causes of action potentially available to recover benefits based on an inconsistency between CIGNA's SPDs and the terms of its plan.

II. EVEN IF PLAINTIFFS COULD RECOVER BENEFITS BASED ON AN INCONSISTENCY BETWEEN AN SPD AND THE PLAN UNDER ERISA § 502(a)(1)(B), A SHOWING OF DETRIMENTAL RELIANCE WOULD BE REQUIRED.

Even if an action to recover benefits based on an inconsistency between an SPD and a plan could be brought under ERISA § 502(a)(1)(B), that action would still require the plaintiff to prove detrimental reliance. Unlike the Second Circuit's "likely harm" standard, the detrimental-reliance requirement is consistent with ERISA's statutory text, common-law origins, and animating purposes.

A. ERISA's Text Supports A Detrimental-Reliance Requirement.

Although the text of ERISA does not expressly create a cause of action to recover benefits based on an inconsistency between an SPD and the plan, the available statutory indicia establish that a participant cannot recover such benefits unless he detri-

mentally relied on the description of benefits in the SPD.

ERISA § 102 requires than an SPD "be written in a manner calculated to be understood by the average plan participant" and that it "reasonably apprise . . . participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a); *see also id.* (an SMM "shall be written in a manner calculated to be understood by the average plan participant"). An SPD thus does not *confer* rights on plan participants in the manner of a contract, but rather "apprises" them of their *existing* rights so that the plan terms can be "understood."

Accordingly, a participant cannot be injured by a deficient SPD unless he consults the SPD in order to "apprise" himself "of [his] rights and obligations under the plan" and the SPD causes the participant to misapprehend his rights and obligations. The Second Circuit's "likely harm" standard turns that textual standard on its head. Instead of requiring a plaintiff—or, in class-action suits such as this one, each of 27,000 plaintiffs—to prove detrimental reliance, the Second Circuit places the onus on the defendant to prove that none of the plaintiffs was injured by the inconsistency between the SPD and the plan. Affirming the lower courts' application of that virtual-strict-liability standard in this case would facilitate recovery by thousands of plaintiffs who in all likelihood never read CIGNA's SPDs—let alone detrimentally relied on them.

That is no doubt why the majority of courts of appeals to consider the question have rejected the "likely harm" approach and instead required a showing of detrimental reliance. The First Circuit initially articulated the detrimental-reliance standard

in *Govoni v. Bricklayers, Masons & Plasterers International Union of America, Local No. 5 Pension Fund*, 732 F.2d 250 (1st Cir. 1984) (Breyer, J.), where it held that a plaintiff seeking recovery based on a conflict between an SPD and the plan "must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description." *Id.* at 252. Subsequent courts that have adopted the detrimental-reliance standard have explicitly invoked *Govoni* in support of their holding. *See*, *e.g.*, *Greeley v. Fairview Health Servs.*, 479 F.3d 612, 614-15 (8th Cir. 2007) (holding that, under *Govoni*, a plaintiff "must show that he took action or failed to take action, that he would not have otherwise, resulting in some detriment"); *see also Health Cost*, 187 F.3d at 711 (holding that a plaintiff may not recover "unless the plan participant or beneficiary has reasonably relied on the summary plan description to his detriment"); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1578-79 (11th Cir. 1992) ("a beneficiary must prove reliance on the summary").

B. ERISA's Common-Law Backdrop Supports A Detrimental-Reliance Requirement.

To the extent that the text of ERISA does not conclusively resolve the issue, it falls upon this Court to establish a standard for recovery through its development of a "federal common law of rights and obligations under ERISA-regulated plans." *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 831 (2003); *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). Those common-law considerations also support a detrimental-reliance requirement.

1. In developing the federal common law of ERISA, this Court most frequently looks to the common law of trusts because there are strong indications in the statute's legislative history that Congress intended trust law to be a "starting point" for judicial analysis. *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000); *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 & n.10 (1985). Trust law, however, adds little here. The situation in traditional trust law that would be most analogous to this case—a trustee's failure to accurately inform a beneficiary of the terms of the trust in a way that injures the beneficiary—does not appear to have arisen with any frequency.

To be sure, trust law imposes upon trustees a duty to furnish to the beneficiary "such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust." Restatement (Second) of Trusts § 173 cmt. c; *see also* Restatement (Third) of Trusts § 82 (stating that trustees have a duty to inform beneficiaries "of basic information concerning the trusteeship" and "significant changes in their beneficiary status"). But although a trustee can be held liable where the trustee violates his duties or exceeds his powers because of *the trustee's* misinterpretation of the trust instrument (Restatement (Second) of Trusts § 201 cmt. b), there is not a clear set of trust-law rules addressing the remedy for a trustee's failure to inform the beneficiary about the terms of the trust.[6]

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[6] One thing *is* clear from trust law, however: A beneficiary's action against a trustee for breach of fiduciary duty is not analyzed as a breach of contract. "A trustee who fails to perform

2. Where the common law of trusts does not provide a clear analogy, this Court has also consulted other areas of the common law to fill gaps in ERISA. For example, in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), the Court looked to "traditional agency law principles" to construe the term "employee," which, though nominally defined in ERISA § 3, is defined circularly. *See id.* at 323 (citing 29 U.S.C. § 1002(3)). Similarly, in developing other areas of federal common law or interpreting ambiguous statutory causes of action, this Court has frequently drawn analogies to traditional common-law causes of action. *See*, *e.g.*, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 343 (2005) ("Judicially implied private securities fraud actions resemble in many (but not all) respects common-law deceit and misrepresentation actions."); *Heck v. Humphrey*, 512 U.S. 477, 484 (1994) ("The common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered . . . .").

Here, the closest analogy among common-law causes of action to the claim that respondents have brought is the family of economic torts premised on misrepresentation, including negligent and fraudulent misrepresentation. And, as explained in the Re-

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his duties as trustee is not liable to the beneficiary for breach of contract." Restatement (Second) of Trusts § 197 cmt. a; *see also id.* §§ 198, 199 (an action "to compel the trustee to redress a breach of trust" was traditionally equitable in character). Accordingly, those courts of appeals that have relied on contract law to support their conclusion that a showing of detrimental reliance is *not* required to recover based on an inconsistency between an SPD and the plan have adopted a mode of analysis that is incompatible with ERISA's trust-law underpinnings. *See Washington*, 497 F.3d at 458; *Burstein*, 334 F.3d at 380-82.

statement (Second) of Torts—"the most widely accepted distillation of the common law of torts" shortly after Congress enacted ERISA (*Field v. Mans*, 516 U.S. 59, 70 (1995))—an *essential* element of those causes of action is the plaintiff's detrimental and justifiable reliance on the defendant's misrepresentation.

Traditionally, an action for negligent misrepresentation would lie where a defendant, "in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions." Restatement (Second) of Torts § 552(1). But, the defendant would be liable *only* "for pecuniary loss caused to [the plaintiffs] by their justifiable reliance upon the information." *Id.* As this Court explained in *United States v. Nestadt*, 366 U.S. 696 (1961), quoting the First Restatement, a defendant is "'subject to liability for harm caused to [plaintiffs] *by their reliance* upon the information'" negligently misrepresented. *Id.* at 708 n.16 (emphasis added); *see also*, *e.g.*, *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos.*, 607 F.3d 742, 747 (11th Cir. 2010) (Florida law: "injury resulted to a party acting in justifiable reliance upon the misrepresentation"); *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 187 (2d Cir. 2004) (New York law: "reliance on the negligent misrepresentation [must be] justified").

Indeed, even an action for *fraudulent* misrepresentation (or "deceit") has traditionally required a plaintiff to prove reliance: "One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss

caused to him by his justifiable reliance upon the misrepresentation." Restatement (Second) of Torts § 525; *see also Field*, 516 U.S. at 70 ("[B]oth actual and 'justifiable' reliance are required" for fraudulent misrepresentation under the Second Restatement).

The "justifiable reliance" requirement of negligent and fraudulent misrepresentation claims means that, if a plaintiff "does not in fact rely on the misrepresentation, the fact that he takes some action that would be consistent with his reliance on it and as a result suffers pecuniary loss, does not impose any liability upon the maker." Restatement (Second) of Torts § 537 cmt. a. That is precisely the theory of recovery under which respondents proceeded in the district court—that they are entitled to recover so long as they *could* have relied on the deficient SPDs—and it is that theory the Second Circuit endorsed in its "likely harm" standard.

The common law also developed special rules for the specific situation where a defendant under a statutory duty to provide information to a plaintiff misrepresents a material fact. There again, the common law required detrimental reliance: "If a statute requires information to be furnished . . . for the protection of a particular class of persons, one who makes a fraudulent misrepresentation in so doing is subject to liability to the persons for pecuniary loss suffered through their justifiable reliance upon the misrepresentation." Restatement (Second) of Torts § 536. Similarly, liability for negligent misrepresentations "of one who is under a public duty to give the information" also required reliance. *See* Restatement (Second) of Torts § 552(1), (3).

The common law imposed this reliance element on misrepresentation-based claims because requiring

a plaintiff to prove detrimental reliance is the clearest way to determine causation. *See Field*, 516 U.S. at 442 ("No one, of course, doubts that some degree of reliance is required to satisfy the element of causation" for injury arising out of fraudulent conduct).

A plaintiff who has not read and detrimentally relied upon an SPD has not suffered an injury caused by an inconsistency between the SPD and the plan. Requiring proof of detrimental reliance confines the cause of action to those sorts of injuries that ERISA's disclosure requirements were designed to prevent.

3. Those courts of appeals that have rejected a detrimental-reliance requirement have generally relied on the common law of contracts—a view that is at odds with the trust-law origins of ERISA. *See supra* n.6. These circuits have conceptualized a claim for SPD-based benefits as a claim that the plan "contract" has been "superseded and modified by conflicting language in the SPD." *Washington*, 497 F.3d at 458 (internal quotation marks omitted). According to these courts, because "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, . . . enforcement of an SPD's terms under a claim for plan benefits does not require a showing of reliance." *Id.* (internal quotation marks and emphasis omitted); *see also Burstein*, 334 F.3d at 380-82.

But, as *Curtiss-Wright* explicitly holds, an SPD cannot "modif[y]" the underlying "contract" unless the plan's amendment procedures so provide. 514 U.S. at 79. Accordingly, the better way to conceptualize an SPD-based claim in contract-law terms is through the doctrine of promissory estoppel. Under that doctrine, a "promise which the promisor should

reasonably expect to induce action or forbearance on the part of the promisee or a third person and *which does induce such action or forbearance* is binding if injustice can be avoided only by enforcement of the promise." Restatement (Second) of Contracts § 90(1) (emphasis added). An SPD that is inconsistent with the terms of the plan is not an amendment to an ERISA plan but rather a gratuitous promise that may induce some employees to act or forbear from acting to their detriment.

To recover based on that gratuitous promise, a plaintiff must prove detrimental reliance. *See* Williston on Contracts § 8:6 (4th ed. 2001) ("[T]he promisee must have relied upon the promise by acting or forbearing to act on the strength of it."); *see also*, *e.g.*, *Addicks Servs., Inc. v. GGP-Bridgeland, LP*, 596 F.3d 286, 300 (5th Cir. 2010) (Texas law); *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 412 n.4 (9th Cir. 1994) (federal common law and California law). Thus, even if it were proper to analogize respondents' cause of action to one arising under contract law, detrimental reliance would still be required.

C. ERISA's Statutory Objectives Support A Detrimental-Reliance Requirement.

In filling gaps in ERISA's statutory text, this Court also considers the legislative objectives that animate ERISA. *See*, *e.g.*, *Conkright v. Frommert*, 130 S. Ct. 1640, 1647 (2010); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813-14 (1997). Like other detailed statutes that were the product of complex legislative negotiations, ERISA strikes a balance among a number of competing objectives—including the protection of employees' vested rights, the freedom of employers to tailor re-

tirement plans to their and their employees' preferences, and the need for efficiency in plan administration. *See Varity*, 516 U.S. at 497.

A detrimental-reliance requirement promotes a number of these important policy objectives—and does so without impeding competing statutory goals.

1. Permitting all plan participants to recover based on an inconsistency between an SPD and the plan—regardless of whether they read (let alone relied on) the SPD—could imperil the actuarial soundness of ERISA defined benefit pension plans. As numerous courts have recognized, one of the key purposes behind ERISA's requirement that a plan be "established and maintained pursuant to a written instrument" is to "protect[ ] the plan's actuarial soundness by preventing plan administrators from contracting to pay benefits to persons not entitled to such under the express terms of the plan." *Mello*, 431 F.3d at 446 (internal quotation marks omitted). Ensuring that a pension plan has adequate funding "depends on stability and predictability"; "[f]orcing trustees of a plan to pay benefits which are not part of the written terms of the program disrupts the actuarial balance of the Plan and potentially jeopardizes the pension rights of others legitimately entitled to receive them." *Cummings by Techmeier v. Briggs & Stratton Ret. Plan*, 797 F.2d 383, 389 (7th Cir. 1986).

Indeed, the written-plan requirement is a critical component of ERISA's broader purpose of ensuring that employees receive the benefits they have been promised under the terms of their plans. As this Court has recognized, "[a]mong the principal purposes of this 'comprehensive and reticulated statute' was to ensure that employees and their beneficiaries

would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984). "Congress wanted to guarantee that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Id.* at 720.

A detrimental-reliance requirement promotes the actuarial soundness of ERISA defined benefit pension plans and preserves employees' legitimate expectations about their benefits. An error in an SPD could potentially have significant consequences for a plan's fiscal well-being if that error entitled every plan participant to additional benefits, regardless of whether they made any decision in reliance on the SPD or even read the SPD.

At the same time, those participants whose benefits were not implicated by the erroneous SPD—for example, employees who retired before the SPD was issued or were hired after a corrected SPD was published—could be adversely affected by an unnecessarily sweeping remedy that imposes significant new plan-funding obligations. Plan funds needed for future pension payments could be depleted. In turn, plan underfunding could trigger legally required benefit payment restrictions that could frustrate employees' retirement planning. Employees could also experience less frequent wage increases and even benefit reductions in the future to compensate for the underfunded pension plan. While these risks may be an acceptable price to pay to compensate those participants and beneficiaries who read and detrimentally relied on deficient SPDs, there is no justifica-

tion for giving other participants and beneficiaries a windfall at the expense of the soundness of the plan. *See Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996). A detrimental-reliance requirement represents a sensible accommodation between fulfilling employees' reasonable expectations and maintaining the plan's long-term financial stability.

These concerns are particularly acute in the class-action context, where a class representative may seek additional benefits on behalf of tens of thousands of plaintiffs, only a handful of whom may have actually relied on the SPD. In such suits, even minor discrepancies between SPDs and plans could result in massive class-wide liability that threatens plans' actuarial soundness.

Moreover, increasing the costs and potential liabilities of operating a pension plan discourages the formation of such plans in the first place. "ERISA represents a 'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Conkright*, 130 S. Ct. at 1648-49 (quoting *Davila*, 542 U.S. at 215). In crafting ERISA, "Congress sought to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Id.* at 1649 (internal quotation marks omitted). For that reason, this Court has been understandably reluctant to impose added "litigation expenses" on plans without a clearly compelling ERISA objective that would be advanced through the additional liability.

The increased liability costs of the Second Circuit's virtual-strict-liability regime could potentially be enormous. Instead of facing lawsuits by only

those employees who relied on an inconsistency between an SPD and a plan, employers would be confronted with the prospect of crippling class-wide liability for any stray comment in an SPD that diverged from the terms of the plan, regardless of whether any employees actually altered their conduct based on the SPD. Such staggering liability could discourage employers from establishing pension plans and compel those employers with plans to terminate them.

This litigation risk will also inevitably result in plan administrators' production of lengthy and complicated SPDs in an effort to guard against any possible inconsistency with the plan. Such prolixity is directly contrary to the core purpose of SPDs—which are intended to provide plan participants with a short, simple, and readily understandable summary of their benefits. Indeed, Congress intended that "[d]escriptions of plans furnished to employees . . . be presented in a manner that an average and reasonable worker participant can understand intelligently." H.R. Rep. No. 93-533, at 7 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646. An increase in the length and complexity of SPDs would herald a return to the pre-ERISA benefits landscape, when the "average plan participant, even where he [was] furnished an explanation of his plan provisions, often [could not] comprehend them because of the technicalities and complexities of the language used." *Id.*

A detrimental-reliance requirement best strikes the balance between creating SPDs on which participants can rely with confidence and not overwhelming participants with technical, legal minutiae about the plan. The requirement ensures that any participant who uses the SPD to make significant decisions about continued employment or other matters can

rely on the SPD as an accurate description of plan terms. At the same time, it does not incentivize plan administrators to draft SPDs so abstruse and dense that they will be useless as basic summaries of plan terms and participant rights.

Finally, by requiring employees to actually *read* their SPDs in order to recover benefits based on an inconsistency with the plan, a detrimental-reliance requirement furthers ERISA's critical purpose of empowering employees to know and enforce their rights under their plans. "[W]hen a beneficiary fails to read or rely on the [SPD], whether it is accurate or not, the beneficiary also prevents full apprisal of the rights under the plan"; "[b]eneficiaries must do their part if Congress' objective is to be met." *Branch*, 955 F.2d at 1579.

2. In contrast, there is nothing in ERISA's statutory objectives that supports awarding windfall benefit recoveries to participants and beneficiaries who never even read or relied on an SPD.

In *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103 (2d Cir. 2003), the Second Circuit made no effort to reconcile its newly devised "likely harm" standard with ERISA's text or common-law underpinnings, but instead reasoned that the "consequences of an inaccurate SPD must be placed on the employer" because "[t]he individual employee is powerless to affect the drafting and less equipped to absorb the financial hardship of the employer's errors." *Id.* at 113. That is no doubt true—which is why an employee who detrimentally relies on an SPD is entitled to recover for her injury. But that fact does not even remotely support awarding a windfall recovery to an employee—or 27,000 employees—who never suffered any "financial hardship" as a result of a de-

ficient SPD. To the contrary, such an award results in significant unfairness to other employees, who may face benefit reductions or wage freezes because of massive, unforeseen pension liabilities.

The Second Circuit also stated that a defendant can, theoretically, "rebut[ ] th[e] presumption of prejudice" that attaches after the plaintiffs have made a minimal showing of "likely harm" by proving "that plaintiffs were aware" of the actual terms of the plan or did not alter their conduct based on the terms of the SPD. *Burke*, 336 F.3d at 114. But this standard, which calls for the defendant to develop evidence about whether each of its thousands of employees read and understood the relevant plan documents, imposes a substantial and unwarranted burden on defendants.

A critical consideration in defining the elements of a common-law cause of action is the "workability" of the potential claim—how it would be proved in practice. *See Wilkie v. Robbins*, 551 U.S. 537, 555 (2007). In most cases—particularly in class actions—the Second Circuit's standard, which places the burden on the defendant to prove that none of the plaintiffs relied on the SPD, will be incredibly difficult to satisfy. "[P]roving a negative is a challenge in any context" (*Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring in the judgment)), and this is especially true when the inquiry turns on someone else's state of mind.

In contrast, a standard that places the burden to prove detrimental reliance on plaintiffs is relatively straightforward in practice. A plaintiff can testify that she read the SPD, did not know of the contrary or omitted plan terms, and relied on the SPD to make a detrimental employment or retirement deci-

sion that she would not otherwise have made if she had known of the actual terms of the plan. It would be up to the factfinder to evaluate the credibility of the plaintiff's testimony and the plausibility of her explanation of reliance. This is hardly an exacting burden for plaintiffs, given that they need only testify about the state of their *own* minds.[7]

This case is a perfect example of the infeasibility of forcing defendants to shoulder the burden of proving that plaintiffs did not rely on an SPD. CIGNA was required to prove, for each of the 27,000 class members, that the participant or beneficiary either knew about the "wear away" phenomenon in the CIGNA Plan or that, if they had learned about it, they would not have taken any action, such as protesting within the company or finding a new job. In an effort to make this showing, CIGNA demonstrated in the district court that "none of the named Plaintiffs left CIGNA as a result of perceived deficiencies in Part B" and that, "even if Plaintiffs had received all of the information they claim should have been included in the notices and disclosures, no Class members' benefits under Part B would have changed" (*i.e.*, class members did not miss an opportunity to accrue greater benefits). Pet. App. 133a. The district court nevertheless ruled that these showings were insufficient to meet CIGNA's burden because CIGNA did not negate the possibility that respondents would have "protest[ed] at the time Part

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[7] Plaintiffs who truly relied on an inconsistency between an SPD and the plan are regularly successful in meeting the detrimental-reliance requirement. *See*, *e.g.*, *Kamlet v. Hartford Life & Acc. Life Ins. Co.*, 144 F. App'x 755, 757 (11th Cir. 2005); *Dodson v. Woodmen of the World Life Ins. Soc'y*, 109 F.3d 436, 439 (8th Cir. 1997).

B was implemented" or "fil[ed] a lawsuit like this one" if they had known about the possibility of "wear away." *Id.* at 137a. CIGNA's defense failed because it was unable to prove a negative.[8]

* * *

The "likely harm" standard formulated by the Second Circuit—and applied by no other circuit—lacks any support in ERISA's statutory text, common-law underpinnings, or legislative objectives. Its application permits recovery by plan participants—in this case, thousands of them—who have suffered no injury attributable to the discrepancy between an SPD and the plan—and who may not have even read the SPD. In so doing, the Second Circuit's "likely harm" standard drains the limited plan assets available to fund other participants' pensions, encourages plan administrators to produce needlessly

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[8] The district court cited three cases in which defendants succeeded in rebutting the "presumption" of prejudice under the Second Circuit's standard. *See* Pet. App. 136a (citing *Weinreb v. Joint Diseases Orthopaedic Inst.*, 404 F.3d 167, 171-72 (2d Cir. 2005); *Park v. Trs. of 1199 SEIU Health Care Emps. Pension Fund*, 418 F. Supp. 2d 343, 354 (S.D.N.Y. 2005); *Pastore v. Witco Corp. Severance Plan*, 388 F. Supp. 2d 212, 221 (S.D.N.Y. 2005), *rev'd in part on other grounds*, 196 F. App'x 18 (2d Cir. 2006)). In each of those cases, however, it was *undisputed* that the plaintiff received notice of the relevant plan terms through channels other than the SPD. *See Park*, 418 F. Supp. 2d at 354; *Pastore*, 388 F. Supp. 2d at 221; *Weinreb v. Hosp. for Joint Diseases Orthopaedic Inst.*, 285 F. Supp. 2d 382, 387 (S.D.N.Y. 2003). In the absence of such undisputed facts, it is virtually impossible for a defendant to prove a participant's level of understanding about her benefits. Moreover, none of those cases was brought as a class action. Here, by contrast, the district court required CIGNA to rebut the showing of "likely harm" as to each of 27,000 class members.

prolix SPDs, and deters other employers from providing pension benefits in the first place. It should be rejected by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

29 U.S.C. § 1022 provides:

§ 1022. 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 de-

scription 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), and if the employer so elects for purposes of complying with section 1181(f)(3)(B)(i) of this title, the model notice applicable to the State in which the participants and beneficiaries reside.

29 U.S.C. § 1024 provides in relevant part:

§ 1024. Filing with Secretary and furnishing information to participants and certain employees

* * *

(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. Notwithstanding 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 par-

ticipants (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 (other than an administrator of a defined benefit plan to which the requirements of section 1023(f) of this title applies) 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, 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.

(5) Identification and basic plan information and actuarial information included in the annual report for any plan year shall be filed with the Secretary in an electronic format which accommodates display on the Internet, in accordance with regulations which shall be prescribed by the Secretary. The Secretary shall provide for display of such information included in the annual report, within 90 days after the date of the filing of the annual report, on an Internet web-

site maintained by the Secretary and other appropriate media. Such information shall also be displayed on any Intranet website maintained by the plan sponsor (or by the plan administrator on behalf of the plan sponsor) for the purpose of communicating with employees and not the public, in accordance with regulations which shall be prescribed by the Secretary.

* * *

29 U.S.C. § 1132 provides:

§ 1132. 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;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) of this section or under subsection (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be pro-

vided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts; or

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor—

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) Except as provided in subsections (c)(9) and (a)(6) (with respect to collecting civil penalties under subsection (c)(9)), the Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title, section 1021(e)(1) of this title or section 1021(f), or section 1025(a) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters

reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(1) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person or who fails to meet the requirements of section 1082(d)(12)(E) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 a day for each violation by any person of subsection (j), (k), or (l) of section 101 or section 1144(e)(3) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with subsection (i) or (m) of section 1021 of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary may assess against any plan sponsor of a multiemployer plan a civil penalty of not more than $1,100 per day—

(A) for each violation by such sponsor of the requirement under section 1085 of this title to adopt by

the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer plan which is in endangered or critical status, or

(B) in the case of a plan in endangered status which is not in seriously endangered status, for failure by the plan to meet the applicable benchmarks under section 1085 of this title by the end of the funding improvement period with respect to the plan.

(9)(A) The Secretary may assess a civil penalty against any employer of up to $100 a day from the date of the employer's failure to meet the notice requirement of section 1181(f)(3)(B)(i)(I) of this title. For purposes of this subparagraph, each violation with respect to any single employee shall be treated as a separate violation.

(B) The Secretary may assess a civil penalty against any plan administrator of up to $100 a day from the date of the plan administrator's failure to timely provide to any State the information required to be disclosed under section 1181(f)(3)(B)(ii) of this title. For purposes of this subparagraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(10) Secretarial enforcement authority relating to use of genetic information

(A) General rule

The Secretary may impose a penalty against any plan sponsor of a group health plan, or any health insurance issuer offering health insurance coverage in connection with the plan, for any failure by such sponsor or issuer to meet the requirements of subsection (a)(1)(F), (b)(3), (c), or (d) of section 1182 of this title or section 1181 or 1182(b)(1) of this title with

respect to genetic information, in connection with the plan.

(B) Amount

(i) In general

The amount of the penalty imposed by subparagraph (A) shall be $100 for each day in the noncompliance period with respect to each participant or beneficiary to whom such failure relates.

(ii) Noncompliance period

For purposes of this paragraph, the term "noncompliance period" means, with respect to any failure, the period—

(I) beginning on the date such failure first occurs; and

(II) ending on the date the failure is corrected.

(C) Minimum penalties where failure discovered

Notwithstanding clauses (i) and (ii) of subparagraph (D):

(i) In general

In the case of 1 or more failures with respect to a participant or beneficiary—

(I) which are not corrected before the date on which the plan receives a notice from the Secretary of such violation; and

(II) which occurred or continued during the period involved;

the amount of penalty imposed by subparagraph (A) by reason of such failures with respect to such participant or beneficiary shall not be less than $2,500.

(ii) Higher minimum penalty where violations are more than de minimis

To the extent violations for which any person is liable under this paragraph for any year are more than de minimis, clause (i) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(D) Limitations

(i) Penalty not to apply where failure not discovered exercising reasonable diligence

No penalty shall be imposed by subparagraph (A) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such penalty did not know, and exercising reasonable diligence would not have known, that such failure existed.

(ii) Penalty not to apply to failures corrected within certain periods

No penalty shall be imposed by subparagraph (A) on any failure if—

(I) such failure was due to reasonable cause and not to willful neglect; and

(II) such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such penalty knew, or exercising reasonable diligence would have known, that such failure existed.

(iii) Overall limitation for unintentional failures

In the case of failures which are due to reasonable cause and not to willful neglect, the penalty imposed by subparagraph (A) for failures shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the plan sponsor (or predecessor plan sponsor) during the preceding taxable year for group health plans; or

(II) $500,000.

(E) Waiver by Secretary

In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the penalty imposed by subparagraph (A) to the extent that the payment of such penalty would be excessive relative to the failure involved.

(F) Definitions

Terms used in this paragraph which are defined in section 1191b of this title shall have the meanings provided such terms in such section.

(10) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the pre-

ceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more partici-

pants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(*l*) Civil penalties on violations by fiduciaries

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) —

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.