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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

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

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REPLY BRIEF FOR PETITIONERS

Respondents and the United States offer no basis in ERISA's text or this Court's precedent for awarding windfall benefits to thousands of class members who never relied on CIGNA's SPDs. As the plain language of ERISA makes clear, an SPD is not itself an ERISA "plan." *See* 29 U.S.C. § 1102(a)(1) ("Every employee benefit plan shall be established and maintained pursuant to a written instrument."). Rather, it is a statutorily required notice that summarizes the plan's terms. When a plan administrator fails to provide SPDs that are "sufficiently accurate" (*id.* § 1022(a)), the administrator has violated ERISA but has not amended the plan. A participant may recover for that statutory violation under ERISA § 502(a)(3) (29 U.S.C. § 1132(a)(3)(B)), *see Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1318-19 (3d Cir. 1991) (Alito, J.), but *only* if the conflict between the SPD and the plan actually caused an injury to the plaintiff by inducing her detrimental reliance.

That conclusion is confirmed by this Court's holding in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), that an SPD may not supersede or modify a plan's terms as set forth in the written plan document unless publishing that SPD satisfies the plan's amendment procedures. Neither respondents nor the United States coherently distinguishes *Curtiss-Wright*. Instead, they stake their positions on a barely relevant strand of *dictum* in *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865 (2009), where the Court stated that it was "uncontested" by the parties that both the written plan and the SPD were "plan documents" for purposes of a section of ERISA not at issue here. It was "uncontested," of course, because *Kennedy* had nothing to do with the consequences of an SPD's divergence from a plan.

Even if a conflict between an SPD and the plan could somehow enable participants to sue for "benefits due . . . under the terms of [the] plan" under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), all parties agree that "nothing in ERISA expressly addresses whether, or in what circumstances, the SPD controls over other documents." U.S. Br. 14-15. For that reason, it would fall to this Court to fashion a sensible common-law standard for recovery. In a quixotic attempt to ground the Second Circuit's "likely harm" standard in the common law of trusts, the United States embraces a "burden-shifting framework" that tracks *precisely* the standard that CIGNA seeks here: one that requires a beneficiary to "pro[ve] that the breach caused him a loss." George T. Bogert et al., *The Law of Trusts and Trustees* § 871 (2d rev. ed. 1982). This Court should adopt that standard—not one that would award a jackpot recovery to thousands of class members who may not have even read their plan's SPD.

I. THERE IS NO STATUTORY BASIS TO RECOVER BENEFITS BASED ON AN INCONSISTENCY BETWEEN AN SPD AND THE PLAN UNDER ERISA § 502(a)(1)(B).

Nothing in the briefs of the respondents or the United States casts doubt on then-Judge Alito's conclusion in *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310 (3d Cir. 1991), that an SPD is not an ERISA plan and that an inconsistency between an SPD and the plan is therefore actionable only under § 502(a)(3).

A. The Question Of The Appropriate Remedial Provision Is Properly Before This Court.

1. Respondents and the United States assert that the question of which remedial provision authorizes recovery based on an inconsistency between an SPD and the plan is not encompassed within the issue that this Court accepted for review. *See* Resp. Br. 37-38 & n.18; U.S. Br. 10, 27-28. They are mistaken. The question of the appropriate statutory basis for this action "is a 'predicate to an intelligent resolution' of the question presented, and therefore 'fairly included therein'" (*Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (quoting S. Ct. R. 14 and *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980))—especially given that respondents do not contest that an action under § 502(a)(3) would require a showing of detrimental reliance to recover additional benefits based on an inconsistency between an SPD and the plan. In any event, CIGNA expressly argued in its petition for certiorari that *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995), forecloses the theory of recovery on which respondents' claim under § 502(a)(1)(B) is premised: that "the allegedly deficient SPDs had 'modified' the Plan." Pet'n 23.

2. Respondents further contend that CIGNA waived its argument regarding the remedial scope of § 502(a)(1)(B) in the district court. Resp. Br. 38 n.19. That is also false. The CIGNA brief that respondents cite argued only that, in light of binding Second Circuit precedent holding that the relief sought by respondents was available under § 502(a)(1)(B), such relief could not *also* be available under § 502(a)(3). *See* D.E. 276, at 12. CIGNA argued in other papers at the district court and appellate levels that § 502(a)(1)(B) "only permit[s] a participant to

seek benefits 'under the terms of [the] plan'—not under an SPD or other plan communication." CIGNA C.A. Reply Br. 27-28; *see also* CIGNA C.A. Opening Br. 45-47 & n.11 ("Defendants acknowledge that other Courts of Appeals have also held that an SPD can effectively modify the terms of an ERISA plan, although some require a showing of prejudice or detrimental reliance . . . [but] none of these Courts of Appeals . . . has reconciled these decisions with the Supreme Court's decision in *Curtiss-Wright* . . . ."); CIGNA Dist. Ct. Post Trial Brief 84, D.E. 251 ("Defendants respectfully submit (and raise this issue to preserve it for appeal) that the Second Circuit's suggestion that an SPD can effectively modify the terms of an ERISA plan is inconsistent with the Supreme Court's decision in *Curtiss-Wright* . . . ."); CIGNA Dist. Ct. Prop. Conc. of Law 58, ¶ 203, D.E. 250-2 (same).

B. *Kennedy* Did Not Hold Or Suggest That Plaintiffs Can Recover Benefits Based On An Inconsistency Between An SPD And The Plan Under § 502(a)(1)(B).

On the merits, both respondents and the United States pin their arguments almost entirely to a sentence in this Court's decision in *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865 (2009). *Kennedy* held that a spousal beneficiary's waiver of benefits is not effective if the ERISA plan itself does not permit such a waiver. *See id.* at 874-77. Respondents and the United States seize on a concluding portion of the opinion in which the Court addressed the petitioner's argument that the form through which the spouse had been selected as a beneficiary was not one of the "documents and instruments governing the plan" under ERISA § 404(a)(1)(D), which sets forth plan administrators' fiduciary duties. 29 U.S.C. § 1104(a)(1)(D). The Court dismissed that argument as beside the point given that both the plan itself and the SPD required the payment of benefits to the spouse, and it was "uncontested" that those documents are "documents and instruments governing the plan." *Kennedy*, 129 S. Ct. at 877.

Kennedy did not have occasion to decide whether an SPD is part of the "plan" within the meaning of § 502(a)(1)(B) or otherwise discuss the consequences of an SPD's divergence from the terms of the plan. That an SPD might generally be considered one of the "documents and instruments governing the plan" for the purposes of fiduciary obligations does not suggest that where an SPD's terms are inconsistent with the terms of the plan set out in the "written instrument under which the plan is established," they supersede those terms. Indeed, in *Kennedy*, though arguing that both the written instrument and the SPD were "plan documents," the United States described the written instrument as "the plan itself," distinguishing it from the SPD. Supp. Br. of the United States, *Kennedy* (No. 07-636). And, in any event, the Court's statement in *Kennedy*, which was "uncontested" by the parties, was *dictum*, given that the SPD did not diverge from the plan in that case and there thus was no need to determine whether the SPD had independent effect as the "plan."

Moreover, contrary to the United States' contention that "a 'plan' is not any single document" (U.S. Br. 22), what *Kennedy* actually held—as a necessary part of its decision—was that the underlying written instrument constituted "an ERISA 'employee pension benefit plan,'" and the opinion treated that written instrument as synonymous with the plan. 129 S. Ct.

at 868.[1] As courts have long recognized, ensuring that the terms of the plan are set out completely in the written instrument is critical to the "stability and predictability" of plan administration. *Cummings by Techmeier v. Briggs & Stratton Ret. Plan*, 797 F.2d 383, 389 (7th Cir. 1986). And *Kennedy* was careful to "express no view regarding the ability of a participant or beneficiary to bring a cause of action under [§ 502(a)(1)(B)] where the terms of the plan fail to conform to the requirements of ERISA and the party seeks to recover under the terms of the statute," confirming that the opinion suggested nothing about the scope of relief available under § 502(a)(1)(B). 129 S. Ct. at 875 n.11.

The controlling decision of this Court is not *Kennedy* but *Curtiss-Wright*, which held that an SPD does not automatically amend plan terms and may effect an amendment *only* when the plan's amendment procedures permit it to do so. That holding cannot be squared with respondents' contention that an SPD that departs from a plan's terms modifies those terms and consequently permits a plaintiff to sue to recover additional benefits under "the plan." 29 U.S.C. § 1132(a)(1)(B). Respondents offer no intelligible distinction of *Curtiss-Wright*, asserting only that SPDs that conflict with plan terms "are not 'amendments' to the plan." Resp. Br. 29. That argument is irreconcilable with this Court's holding

[1] The United States cites *Pegram v. Herdrich*, 530 U.S. 211 (2000), to support its amorphous understanding of what constitutes an ERISA plan. U.S. Br. 22. But *Pegram* did not imply that the "written instrument" under ERISA § 402(a)(1) is distinct from the "plan," 29 U.S.C. § 1102(a)(1), but rather identified the characteristics of a written instrument that would qualify it as a "plan." 530 U.S. at 223.

that an SPD that "effect[s] a significant change in the plan's terms"—as would an SPD that entitled participants to recover additional "benefits due . . . under . . . [the] plan"—"constitute[s] an 'amendment' to the plan" that must comply with the plan's amendment procedures. *Curtiss-Wright*, 514 U.S. at 76, 85.

The United States observes that "*Curtiss-Wright* did not address whether the new provision was a valid amendment" or hold "that it would violate plan amendment requirements to determine benefits based on the terms of an SPD." U.S. Br. 24. That is true but irrelevant: *Curtiss-Wright* held that *unless* the SPD complied with the plan's amendment procedures, it could not supersede the terms of the plan. Here, the SPD that respondents and the United States claim constitutes part of the "plan" explicitly disclaims such status and provides that the CIGNA Plan—not the SPDs—controls in the event of a conflict. *See* J.A. 922a, 938a. Because no party asserts that the SPDs complied with the CIGNA Plan's amendment procedures, *Curtiss-Wright* necessarily establishes that the terms of the SPD did not become part of the plan.

C. The Sundry Statutory And Policy Arguments Of Respondents And The United States Have No Merit.

Aside from *Kennedy*, neither respondents nor the United States offers more than the most meager support for permitting the recovery of benefits based on an inconsistency between the SPD and the plan.

1. Respondents selectively quote the statutory language, asserting that ERISA refers to SPDs and "'other instruments under which the plan was established or is operated'"—the implication being that an SPD is one such instrument. Resp. Br. 26 (quoting

29 U.S.C. §§ 1024(b)(2), 1029(c)). But the residual statutory phrase "other instruments" does not in fact refer back to "summary plan description." Rather, it refers to a list of terms beginning with "bargaining agreement": "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." 29 U.S.C. § 1024(b)(2) (emphases added); *see also id.* § 1029(c). The only conclusion that can be drawn from this statutory language is that an SPD is *not* an "instrument under which the plan was established or is operated." *See also* 29 U.S.C. § 1022(a) (referring to a "summary plan description *of* an employee benefit plan") (emphasis added).

Respondents also cite snippets of legislative history to support their view that the SPD is part of the plan. Resp. Br. 22. Those brief statements say nothing about the remedial scope of § 502(a)(1)(B) or whether Congress intended *all* participants to recover additional benefits whenever an SPD diverges from the terms of the plan. That Congress thought it would be "grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts," is fully consistent with CIGNA's plain-language interpretation of ERISA, which permits participants harmed by misrepresentations to recover under § 502(a)(3). H.R. Rep. No. 93-533 at 7, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646. Indeed, when Congress wanted a disclosure violation to potentially entitle participants to additional benefits under § 502(a)(1)(B), it said so explicitly. *See*, *e.g.*, 29 U.S.C. § 1054(h)(6)(A) (an "egregious failure" by the plan administrator to provide an accurate § 204(h) notice can lead to an award of additional benefits). Tellingly, ERISA is silent as to the availability of additional benefits based on SPD violations.

The textual analysis set out by then-Judge Alito in *Gridley* is far more persuasive than anything respondents have presented. Respondents dismiss Judge Alito's analysis because it is "only one paragraph" long and because a different Third Circuit panel characterized its holding in the alternative as "dictum." Resp. Br. 39-40. But the brevity of *Gridley*'s discussion—set off in a separately numbered section of the opinion as an alternative holding—is attributable to the fact that it is so "clear[ ]" that an ERISA plan "does not encompass a summary plan description" (924 F.2d at 1318), not to the absence of "thorough" analysis. Resp. Br. 39.[2]

2. For its part, the United States relies on *UNUM Life Insurance Co. of America v. Ward*, 526 U.S. 358 (1999), to argue that an inaccurate statement in an SPD should create a term implied by law in the underlying plan document. U.S. Br. 28-29. In *UNUM Life*, however, this Court held only that a state-law rule that *indisputably* created a mandatory contract term in insurance contracts was not preempted by ERISA. *See* 526 U.S. at 368-77. That holding sheds no light on whether an SPD is a "plan document" and, if so, whether it overrides other plan documents with which it conflicts.

[2] The United States briefly asserts that respondents' suit could be authorized by other clauses of § 502(a)(1)(B) (U.S. Br. 29), but they suffer from the same flaw: Because the SPD is not the "plan," any award obtained in a successful suit would not derive from "rights" under the plan or constitute "future benefits" under the plan.

Respondents similarly rely on circuit precedent holding that legally unenforceable terms of ERISA plans, such as unlawful vesting requirements, may not be enforced. Resp. Br. 40-41 (citing, *inter alia*, *Page v. PBGC*, 968 F.2d 1310 (D.C. Cir. 1992)). But while that is true when a substantive ERISA prohibition *expressly* bars enforcement of a challenged plan term, nothing in ERISA states that an SPD controls over other plan documents in the event of a conflict. And in fact, as respondents acknowledge, the D.C. Circuit held in *Page* that § 502(a)(3)—not § 502(a)(1)(B)—is the appropriate section to enforce "'provisions of this title.'" Resp. Br. 40 (quoting 968 F.2d at 1315). That is precisely CIGNA's point.

3. In its opening brief, CIGNA argued that the structure of ERISA, which assigns the drafting of plans to plan sponsors but the drafting of SPDs to plan administrators, demonstrates that an SPD is not part of the "plan." CIGNA Br. 15-16. The United States disputes this basic structural fact, arguing that ERISA requires an administrator only to "furnish" SPDs to participants, not necessarily to *draft* them, a task that the United States suggests may fall to plan sponsors. U.S. Br. 23.

That interpretation of ERISA contradicts the Department of Labor regulation implementing ERISA § 102, 29 U.S.C. § 1022. That regulation states that, "[i]n fulfilling these requirements [that an SPD be comprehensible and comprehensive], the *plan administrator* shall exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan." 29 C.F.R. § 2520.102-2(a) (emphasis added); *see also*, *e.g.*, *Lee v. Union Elec. Co.*, 789 F.2d 1303, 1307 (8th Cir. 1986) (explaining that the regulation applies to "plan administrators, in drafting the summary plan description"). It was thus the understanding of the United States up until this case that ERISA assigns plan administrators—not plan sponsors—the responsibility of drafting SPDs. *See also Helfrich v. Carle Clinic Ass'n, P.C.*, 328 F.3d 915, 917 (7th Cir. 2003) (Easterbrook, J.) ("ERISA requires plans to prepare summary plan descriptions . . . . Employer-prepared summaries, by contrast, have no footing in ERISA . . . .").

4. Finally, the United States argues that "[c]hannelling" suits for flawed SPDs into § 502(a)(1)(B) serves ERISA's purposes because § 502(a)(3) "generally" does not include an administrative-exhaustion requirement. U.S. Br. 29-30. Even assuming that this policy concern could influence the Court's interpretation of the plain language of § 502(a)(1)(B) and ERISA's plan amendment requirements, the United States' cited authority states only that the courts of appeals "are in sharp disagreement" over the exhaustion issue, a conflict this Court has yet to resolve. *Smith v. Sydnor*, 184 F.3d 356, 364 (4th Cir. 1999). It would be especially misguided to tailor this Court's interpretation of § 502(a)(1)(B) to a policy concern that may not even exist.

II. NEITHER RESPONDENTS NOR THE UNITED STATES PROVIDES ANY PERSUASIVE ARGUMENT AGAINST A DETRIMENTAL-RELIANCE STANDARD.

Even assuming that the recovery of benefits based on an inconsistency between an SPD and the plan is permitted under § 502(a)(1)(B), respondents and the United States offer no plausible basis for permitting recovery on a mere showing of "likely harm."

A. The Textual Arguments Of Respondents And The United States Are Misplaced.

1. The United States argues that because ERISA § 404(a)(1)(D) requires fiduciaries to act "in accordance with the documents and instruments governing the plan" only "insofar as such documents and instruments are consistent with [ERISA]," 29 U.S.C. § 1104(a)(1)(D), and because it is a violation of ERISA § 102 to issue an inaccurate SPD, *id.* § 1022, participants must be permitted to recover based on an inconsistency between an SPD and the plan whenever they make a showing of "likely harm." *See* U.S. Br. 14-15. That rule, the United States contends, "avoids a violation of the SPD provisions" and therefore is compelled by the text of ERISA. *Id.*

That argument is classically question-begging. Regardless of whether the plan or the SPD controls, there will be a violation of ERISA—either § 102, which requires SPDs to be accurate, or § 402, which requires plans to be established "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). ERISA no more permits that written instrument to be inaccurate than it does an SPD, and it no more allows plans to make *excessive* payments to certain participants than it permits them to make insufficient payments.

2. Respondents argue at great length that the "average or 'reasonable' person standard" governs whether an SPD is inaccurate. Resp. Br. 30-33. The question presented, however, is not *whether* an SPD is inaccurate, but rather *what* a plaintiff must prove

to recover benefits based on an inconsistency between an SPD and the plan. Neither the cases that respondents cite for the "average person" standard (Resp. Br. 30) nor the unrelated regulations that respondents identify (*id.* at 31) shed light on that question.

Respondents nevertheless jump from the uncontroverted proposition that an SPD that would mislead an average plan participant violates ERISA § 102 to the conclusion that so long as the conflict with the plan is "material," every participant can recover additional benefits under § 502(a)(1)(B). Resp. Br. 33. Respondents provide no logical or textual reason for that leap. Instead, they manufacture support by contending that the phrase "possible prejudice" in the standard applied by the majority of circuits is equivalent both to the Second Circuit's "likely harm" standard and respondents' "material conflict" standard. *Id.* at 34.

Respondents misread the cases. The first court of appeals to articulate the "significant reliance upon, or possible prejudice" standard was the First Circuit in *Govoni v. Bricklayers, Masons & Plasterers International Union of America, Local No. 5 Pension Fund*, 732 F.2d 250 (1st Cir. 1984) (Breyer, J.). By "possible prejudice," the First Circuit meant whether a plaintiff probably would not have taken a specific action (such as a decision to retire) had she known the true plan terms—a type of detrimental reliance. *See id.* at 252 ("The only conceivable prejudice to which Govoni points . . . concerns his decision to retire . . . .").

Subsequent cases from other circuits adopting the *Govoni* standard have similarly understood it as a detrimental-reliance requirement, describing the standard variously as requiring a plaintiff to "show that he took action or failed to take action that he would not have otherwise, resulting in some detriment" (*Greeley v. Fairview Health Servs.*, 479 F.3d 612, 614-15 (8th Cir. 2007)); to demonstrate that he "has reasonably relied on the summary plan description to his detriment" (*Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999)); and to "prove reliance on the summary" (*Branch v. G. Bernd Co.*, 955 F.2d 1574, 1578-79 (11th Cir. 1992) (citing *Govoni*)). In fact, respondents themselves later concede that "[m]any of the cases under the 'possible prejudice' standard reach results that are only compatible with detrimental reliance." Resp. Br. 36.

3. Aside from their self-contradictory reading of lower-court precedent, respondents place great weight on this Court's interpretation of RICO in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008). *See* Resp. Br. 49-52. In *Bridge*, the Court held that the private RICO cause of action does not require proof of first-party reliance because "[n]othing on the face of the relevant statutory provisions imposes such a requirement." 553 U.S. at 648. Here, by contrast, "the face of the relevant statute" says nothing at all about the elements of an action to recover benefits based on an inconsistency between an SPD and the plan. *See* U.S. Br. 14-15. It therefore falls to this Court to develop a sensible federal common-law standard for recovery.

In any event, *Bridge* rejected only a *first-party* reliance requirement, while emphasizing that "none of this is to say that a RICO plaintiff who alleges injury 'by reason of' a pattern of mail fraud can prevail without showing that *someone* relied on the defendant's misrepresentations." 553 U.S. at 658. As the

Court explained, "a misrepresentation can cause harm *only* if a recipient of the misrepresentation relies on it," even if that harm ultimately falls on a third party (such as a beneficiary-spouse, in the ERISA context). *Id.* at 656 n.6 (emphasis added).

B. The "Likely Harm" Standard Finds No Support In Common-Law Doctrines.

1. The United States argues that this Court should treat the SPD as a contract because this Court stated in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989), that "benefits protected by ERISA are 'contractually defined.'" U.S. Br. 15. *Firestone*, however, said nothing about whether documents other than the underlying written instrument were also to be considered part of the contract, or whether instead an inconsistency between such documents and the written instrument is more properly analyzed under tort or trust law.

The United States draws an analogy to group insurance contracts, where, it says, a certificate promising more favorable benefits trumps an underlying policy. U.S. Br. 17. But the very treatise that the United States cites describes a conflict of authorities among state courts on that issue when ERISA was enacted. *Compare* 1 John Alan Appleman & Jean Appleman, *Insurance Law & Practice* § 46, at 155-56 (rev. 1981) (pages cited by the United States), *with id.* § 46, at 152-53. Thus, for example, in the early 1970s, New York courts held that "[a] certificate of insurance issued to a beneficiary . . . is merely evidence of insurance, not the contract . . . and where"—as with CIGNA's SPDs—"the certificate is expressly made subject to the terms and conditions of the policy, the beneficiary is bound thereby, and in case of any conflict or ambiguity, the policy controls." *Blue Cross of Ne. N.Y., Inc. v. Ayotte*, 315 N.Y.S.2d 998, 1001 (App. Div. 1970). These divided authorities hardly illuminate the intent of the Congress that enacted ERISA.

2. The United States also points to trust law, analogizing the "likely harm" standard to a burden-shifting framework developed for breaches of trust causing a loss to the trust corpus, such as investment errors. U.S. Br. 17-18; Restatement (Second) of Trusts §§ 205, 212. But to the extent that framework translates in any meaningful way to misstatements in SPDs about the terms of an ERISA plan, it does not remotely resemble the "likely harm" standard: It requires the beneficiary to provide "*proof* that the breach caused him a loss"—precisely what CIGNA argues should be required here. Bogert et al., *supra*, § 871 (emphasis added). Only after the plaintiff has proved loss causation does the burden shift to the trustee to demonstrate that the loss to the trust corpus would have occurred anyway. *See, e.g.*, *In re Captran Creditors' Trust*, 128 B.R. 469, 475 (M.D. Fla. 1991) ("The initial burden is on the trust beneficiaries to prove that a breach of duty occurred *which proximately caused* the injury.") (emphasis added).

Applying that framework, courts have flatly rejected the "novel proposition that, whenever a breach of the obligation by a trustee has been proved, the burden shifts to the trustee to establish that any loss suffered by the beneficiaries of the trust was not proximately due to the default of the trustee." *U.S. Life Ins. Co. in City of N.Y. v. Mechs. & Farmers Bank*, 685 F.2d 887, 896 (4th Cir. 1982). The Second Circuit's "likely harm" standard employs precisely the type of burden-shifting rejected by trust law.

Respondents also look to trust law for support for the "likely harm" standard, but their cited sources have no relevance to the issue in this case. Their long quotation from Professor Bogert's treatise (Resp. Br. 44), for example, addresses an entirely different subject—interested transactions between the trustee and the trust. *See* George T. Bogert, *Trusts* § 96 (6th ed. 1987).

Respondents accuse CIGNA of "ignor[ing] an entire line of ERISA cases that have been decided under Section 173" of the Restatement (Second) of Trusts. Resp. Br. 44-45. At issue in the cited cases, however, were breach-of-fiduciary-duty claims under § 502(a)(3), which respondents disclaimed here and which in any event have long been held to require a showing of detrimental reliance. CIGNA Br. 20-24. Indeed, in each case it was clear that the deceased participant had detrimentally relied on the fiduciary's breach. *See*, *e.g.*, *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 749-50 (D.C. Cir. 1990) (participant failed to renew coverage based on misrepresentation). In any event, even if these precedents were otherwise relevant, trust-law principles developed *after* the passage of ERISA do not illuminate the common law of trusts that "Congress invoked" in enacting the statute. *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985).

C. The "Likely Harm" Standard Would Not Advance ERISA's Statutory Objectives.

1. The United States' defense of the "likely harm" standard rests largely on its view that "the SPD is, in significant respects, the paramount plan document." U.S. Br. 13. That position focuses too

myopically on only *one* policy objective of ERISA: keeping participants informed of their rights under the plan. While that is certainly an important statutory goal, ERISA also has other important concerns, not the least of which is protecting the solvency of plans by ensuring that fiduciaries administer plans only in accordance with their written terms. Allowing statements in SPDs to trump the written instrument, even where that inconsistency caused no actual harm to the participants, needlessly imperils plan solvency for very little gain in participants' understanding of their rights. In fact, the tendency of a virtual strict-liability standard to encourage administrators to draft unnecessarily detailed and effectively unreadable SPDs likely outweighs any countervailing benefit.

The United States barely addresses ERISA's concern with plan solvency, blithely assuring this Court that it will be easy for an employer "to defeat a claim to benefits by showing that the participant should reasonably have expected that less favorable terms in other documents would govern." U.S. Br. 19. But the United States never gives an example of how an employer could prove this in practice. Indeed, it is hard to see how that showing could ever be made, given that CIGNA's SPDs expressly stated that the underlying plan would control in the event of a discrepancy. J.A. 922a, 938a. If that does not suffice to inform employees that "less favorable terms in other documents would govern," nothing does.

The United States nevertheless contends that the "'likely harm' approach reflects a sensible allocation of the burden of proof" because "an employee may have significant difficulty proving that he relied on the SPD in forming an expectation about his pension benefits," giving as an example an employee who learned of the inaccurate disclosures through workplace conversations. U.S. Br. 20-21. That concern is vastly overstated. An employee who testified that she learned of a promised benefit from co-workers and offered a plausible example of her reliance on that understanding—for instance, the untimely filing of a benefits claim—would, if credible, have little trouble meeting her burden of proof. Numerous decisions have denied defendants' summary-judgment motions based on nothing more than plausible testimony of reliance by plaintiffs.[3]

The United States also suggests that beneficiaries will be unable to prove that a deceased participant relied on the inconsistency between the SPD and the plan. U.S. Br. 25-26. But that conjecture, too, ignores the actual cases in which courts have found that the plaintiff proffered sufficient evidence of reliance to create a triable issue of fact. *See*, *e.g.*, *Toohey v. Wyndham Worldwide Corp. Health & Welfare Plan*, _ F. Supp. 2d _, 2010 WL 2929435, at *13 (D. Or. July 26, 2010); *Kaiser Permanente Emps. Pension Plan v. Bertozzi*, 849 F. Supp. 692, 699 (N.D. Cal. 1994).

Moreover, in stark conflict with their contention that the detrimental-reliance standard is too great a

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[3] *See*, *e.g.*, *Aiken v. Policy Mgt. Sys. Corp.*, 13 F.3d 138, 141 (4th Cir. 1993); *Grant v. Sprint Nextel Corp.*, _ F. Supp. 2d _, 2010 WL 2640627, at *3 (W.D. Va. July 2, 2010); *Antolik v. Saks, Inc.*, 383 F. Supp. 2d 1168, 1177-78 (S.D. Iowa 2005); *McNutt v. J.A. Jones Constr. Co.*, 33 F. Supp. 2d 1375, 1380 (S.D. Ga. 1998); *Heise v. Genuine Parts Co.*, 900 F. Supp. 1137, 1149 (D. Minn. 1995); *Kochendorfer v. Rockdale Sash & Trim Co., Inc. Profit Sharing Plan*, 653 F. Supp. 612, 616-17 (N.D. Ill. 1987); *see also Hansen v. Cont'l Ins. Co.*, 940 F.2d 971, 983 (5th Cir. 1991).

hurdle for plaintiffs, both respondents and the United States repeatedly imply that respondents could satisfy a detrimental-reliance standard *in this case*, adverting to evidence in the record such as an internal CIGNA survey. Resp. Br. 20; U.S. Br. 5, 31-32.[4] Respondents would of course be free to cite such evidence on remand. But their apparent belief that this sort of evidence would suffice to prove detrimental reliance plainly undercuts their contention that the detrimental-reliance requirement would "impose tremendous burdens" on plaintiffs. Resp. Br. 5.

2. The United States raises the specter that, in contrast to the "likely harm" standard, a detrimental-reliance approach would "cause benefits under a single plan to vary"—an argument that pointedly reveals that the United States does not believe that defendants could rebut the "prima facie" showing of "likely harm" in individual cases. U.S. Br. 26. In any event, some variance in benefits will occur no matter which approach this Court adopts: Even under the Second Circuit's standard, those participants and beneficiaries who either retired before or were hired after the relevant SPD was issued will receive benefits computed under different standards from other employees. But only the detrimental-reliance standard will confine that variance to employees who actually suffered an injury based on the conflict be-

[4] That survey was conducted six months *before* the SPDs at issue here were published and referred to a separate benefit communication from December 1997. Moreover, the survey had an incredibly low response rate. *See* J.A. 894a. It does not take an expert in statistics to see the selection bias inherent in estimating the percentage of employees who read and understood communications based on the few employees who read and responded to a survey.

tween the SPD and the plan. The "likely harm" standard, by contrast, drains plan assets to the benefit of all employees who happened to be employed when the SPD was issued—to the potential long-term detriment of both those employees and their coworkers who could, for example, see less generous benefit packages offered in the future.

3. The United States argues that a detrimental-reliance requirement would give participants less protection than before ERISA was enacted, when participants supposedly "could recover benefits based on summaries of plan provisions under a contract law theory." U.S. Br. 26. But as the United States concedes in a footnote, pre-ERISA decisions "generally allowed underlying documents to prevail over a summary if the summary stated that they would control"—as CIGNA's SPDs did here. U.S. Br. 26 n.8; *see also* J.A. 922a, 938a. Thus, prior to ERISA, in a case such as this one, *no participants* would have been able to recover additional benefits based on the inconsistency between the SPDs and the plan.

4. Finally, respondents, supporting *amici*, and even the United States repeatedly complain that with a detrimental-reliance requirement, plaintiffs "could never prevail in a class action" (Resp. Br. 5), with *amici* going so far as to say that the requirement is "inconsistent with policies underpinning Federal Rule of Civil Procedure 23." NELA Br. 31. One can scarcely imagine a clearer violation of the Rules Enabling Act's admonition that the federal rules shall not "abridge, enlarge or modify any substantive right" than to interpret ERISA with an eye toward facilitating class certification. 28 U.S.C. § 2072(b). In any event, the concern that precluding certification of individualized ERISA claims would foreclose meritorious suits is unfounded. Suits for

pension benefits are not negative-value suits, such as some antitrust actions, where each putative plaintiff may be entitled to only a few dollars. In this case, for example, two of the named plaintiffs alleged that they were owed more than $30,000 in benefits. *See* J.A. 113a. Even if it were proper to interpret federal statutes to facilitate class certification, it would be unnecessary to do so in a setting such as this, where plan participants generally have a strong incentive to file individual claims.[5]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[5] Indeed, individual plaintiffs regularly file claims based on an alleged inconsistency between an SPD and the plan. *See*, *e.g.*, *supra* note 3.