

Focus On...

Scrivener's Errors

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This article discusses the doctrine of scrivener's error as it relates to plan drafting mistakes. There is no denying that inadvertent errors occur in retirement plan documents. Pretending that honest mistakes never happen is irresponsible, and zero tolerance

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is not an appropriate standard for those hardy employers willing to brave the slings and arrows of ERISA compliance.

Introduction

IRS representatives have consistently taken the position that the doctrine of scrivener's error does not allow an employer simply to self-correct a mistake in a retirement plan document. This article discusses the doctrine and its possible application in this context.

Legal Background

A retirement plan document is a contract, and the plan participants and beneficiaries are entitled to enforce, against the employer and other plan fiduciaries, their contractual rights under the document. ERISA and the Code generally require plan assets to be held in trust, and many of the substantive rules under ERISA (*e.g.*, the duty of prudence) are derived from the common law of trusts. Accordingly, in areas where the Code and ERISA do not provide definitive rules, courts will often look to general contract and trust law.

The scrivener's error doctrine, which is part of contract law, provides that an error in a written contract may be corrected by oral evidence if the evidence is clear, convincing, and precise, even if the contract is otherwise unambiguous. [*See, e.g.*, 7-28 Corbin on Contracts § 28.45] If such a correction affects property rights, then it generally must be approved by those people affected by it.

The IRS has consistently taken the position that the doctrine may not be used by an employer to self-correct an error in a retirement plan document except as provided under the Employee Plans Compliance Resolution System ("EPCRS"), as most recently republished. [Rev. Proc. 2006-27] In other areas, the IRS has taken a more liberal position. Thus, for instance, the IRS has ruled that a charitable remainder unitrust (CRUT) could be reformed to correct a scrivener's error. [*See, e.g.*, PLR 200811003, December 10, 2007]

Anecdotal evidence suggests that there has been a significant recent increase in the frequency of scrivener's errors. First, frequent changes in pension law have required numerous plan amendments, many of which are highly technical. Second, many plan sponsors have changed from custom-made documents specifically drafted for them, typically by an attorney, to a prototype or volume submitter plan, and many have changed from one prototype to another, typically in connection with a change of investment provider.

Even if the new document is carefully reviewed by the employer and its pension advisors, it is almost impossible to be certain that the new document does not change the rules of the plan in ways that were never intended or considered by the plan sponsor.

The IRS has, at least implicitly, encouraged the trend toward greater use of prototype and volume submitter plans by liberalizing the provisions that may be included in such plans and by setting much higher user fees for reviewing individually designed plans than prototypes or volume submitters. Accordingly, given that mistakes are inevitable in connection with such document changes, it would be equitable for the IRS to provide a simple and inexpensive method of correction where there is adequate evidence that the document includes a mistake.

Why does the IRS take such a hard line? First, there is the fundamental qualification requirement, long enshrined in the regulations, that a qualified plan must be a “definite written program and arrangement which is communicated to the employees....” [Treas. Reg. § 1.401-1(a)(2)] This requirement has been upheld by the Tax Court. [Engineered Timber Sales, Inc. v. Commr., 74 TC 808 (1980); G & W Leach Co. v. Commr., T.C. Memo 1981-91 (1981)]

A similar rule appears in ERISA. The plan document must:

1. Provide for one or more named fiduciaries who jointly or severally have authority to control and manage the operation and administration of the plan;
2. Provide a procedure for establishing and carrying out a funding policy and method, consistent with the objectives of the plan and the requirements of Title I of ERISA;
3. Describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan;
4. Provide a procedure for amending the plan, and for identifying the persons who have authority to amend the plan; and
5. Specify the basis on which payments are made to and from the plan.

[ERISA § 402]

In addition, a pension plan must provide definitely determinable benefits [Treas. Reg. § 1.401-1(b)(1)(i)], and a profit-sharing or stock bonus plan must provide a definite, predetermined formula for allocating contributions. [Treas. Reg. § 1.401-1(b)(1)(ii), (iii)]

These requirements mean that all interested parties (including the IRS, the DOL, plan participants, and beneficiaries) should be able to determine, *from the document itself*, exactly what are the rights and obligations of the employer and the participants. The resulting certainty would be undermined if the employer could simply ignore provisions of the plan document on the basis that they were included in error.

Second, how does one distinguish between a genuine mistake and the desire of a plan sponsor to rewrite retroactively a provision that, in hindsight, it regrets? To allow the latter would undermine significantly some of the participants’ basic protections, such as the anti-cutback rule. [IRC § 411(d)(6); ERISA § 204(g)]

Third, the provision of retirement benefits under a qualified plan is significantly different from most other private trusts, which represent a gratuitous transfer from the settlor to the objects of his or her bounty. Reformation of a family or charitable trust is typically effected to secure desired tax benefits, with the consent of all beneficiaries. By contrast, the employer generally wants to apply the scrivener’s error doctrine retroactively to a retirement plan, rather than simply making a prospective plan amendment, in order to withhold benefits that would be provided under the written plan.

One fundamental problem with scrivener’s errors is that the parties to litigation generally have adverse interests, so cannot agree as to what was the intent when the document was executed. One possible approach would be to specify in any plan amendment or restatement exactly what the scope of the changes is intended to be, and to state specifically that any changes beyond that scope are unintended and should be disregarded in interpreting the plan.

EPCRS

Section 4.05 of Rev. Proc. 2006-27, provides that a plan can be retroactively amended under VCP or Audit CAP to *conform* its terms to its prior operation, provided that the amendment (1) is not discriminatory in favor of highly compensated employees and (2) does not reduce any accrued benefits (a “reformation CAP”). Although not stated in Section 4.05, in practice the IRS requires that reformation CAP is only available if there is adequate evidence that the plan, as written, was not what the employer intended. This can be established by direct evidence or by circumstantial evidence. In order to be eligible for VCP, the correction must be made before it is discovered by the IRS on audit. Otherwise, only Audit CAP is available, and

unlike VCP, under Audit CAP a sanction must be paid to the IRS, based on a percentage of the maximum amount of tax that would be due if the plan were disqualified. Accordingly, this is often an unacceptably expensive approach for the employer.

Alternatively, it may be possible to correct a scrivener's error *without* either being eligible for VCP or using Audit CAP, if one can demonstrate, *by clear and convincing evidence*, that (1) the employer and its employees were in agreement on the terms of the plan but (2) the individuals preparing the document failed to draft the plan correctly to reflect that agreement. If these conditions are satisfied, then it may be possible to convince a court to "reform" the plan's written terms to conform to its prior, intended operation. Under these circumstances, there is strong legal authority for the proposition that the plan was never subject to disqualification, and thus Audit CAP is unnecessary to maintain the plan's qualified status.

Anti-Cutback Issues

The vesting and benefit accrual rules under the Code and ERISA would be meaningless if the employer could reduce the employee's accrued benefit. Accordingly, the statutes further provide that a participant's accrued benefit generally may not be reduced by a plan amendment. [ERISA § 204(g); Code § 411(d)(6)] In determining whether a participant's accrued benefit is reduced, all plan provisions which, directly or indirectly, affect the computation of the accrued benefit are taken into account. However, a plan *may* be amended to eliminate or reduce benefits which have not yet accrued as of the later of the adoption date or the effective date of the amendment. The Retirement Equity Act of 1984 ("REA") greatly expanded the scope of Code Section 411(d)(6) and ERISA Section 204(g) by amending the statutes to provide that a plan amendment will be treated as reducing accrued benefits if, with respect to benefits attributable to service before the amendment, the amendment:

1. Has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy, with respect to a participant who, before or after the amendment, satisfies the pre-amendment conditions for the subsidy; or
2. Has the effect of eliminating an optional form of benefit.

[REA § 301(a)]

Cases Involving Scrivener's Errors

Although the arguments have not always succeeded, the courts generally have been more receptive to arguments involving scrivener's error than has the IRS.

In *Murata*, a provision allowing reversion to the company of excess funds due to erroneous actuarial computation was excluded from the Plans when they were restated in 1977. [International Union of Electronic, Electric, Salaried, Machine and Furniture Workers v. Murata Erie North America, Inc., 980 F.2d 889 (3d Cir., 1992)] The employer argued that the parties never intended to delete the employer's right of reversion. The participants contended that the language of the Plans unambiguously prohibited a reversion and, therefore, that *Murata's* recoupment was impermissible. The appeal court reversed the grant of summary judgment to the participants, because genuine issues of material fact existed as to whether the collective bargaining agreement permitted the unilateral pension plan amendment by which the excess funds reverted to the employer. The court also held that the doctrine of scrivener's error applies in the ERISA context.

Under the doctrine of scrivener's error, the mistake of a scrivener in drafting a document may be reformed based upon parol evidence, provided the evidence is "clear, precise, convincing and of the most satisfactory character" that a mistake has occurred and that the mistake does not reflect the intent of the parties....As we have previously noted in a different context, one statutory goal of ERISA is to insure that "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan."...Allowing the doctrine of scrivener's error to apply in ERISA cases would seem at odds with this statutory purpose. A plan document containing a scrivener's error might mislead an employee into believing he had rights or obligations that he did not, in fact, have. If, on the other hand, the employer were bound by the plan documents, whether or not they contained errors, the employee would know precisely his obligations and rights upon reading the plans.

Despite this potential tension with a statutory purpose of ERISA, we believe that the scrivener's error doctrine is appropriate in this particular case. Here, the alleged error relates to what is admittedly a "windfall" for either *Murata* or the plaintiffs—an excess remaining in the Plans that neither side could have reasonably expected. The plaintiffs' reasonable reliance on the 1977 Plan documents would probably not have led them to believe that there would be

any excess funds remaining upon termination. Nor is it likely that reading the Plan documents would have led participants to believe that if any excess funds remained after termination, that excess would be distributed to them. ERISA's goal of providing clear Plan documents is, therefore, less pertinent in this situation, and we believe that application of the scrivener's error doctrine is appropriate.

In *Schutte v. Maleski*, the plaintiffs requested reformation of a scrivener's error, claiming that a plan amendment, as written, did not reflect the intent of the board of directors as to who was to receive enhanced benefits under the amendment. [1993 U.S. Dist. LEXIS 6980 (E.D. Pa., 1993)] The court concluded that the plaintiffs had stated a claim under the scrivener's error principle. "Plaintiffs may not be able to muster sufficient parol evidence to meet the stringent test explained in [*Murata*], but that analysis must await another day."

In *Gamble*, when the plaintiff retired as president and chief executive officer of a corporation, he became entitled to a pension from a tax-qualified plan and to additional benefits from an excess benefit plan and a supplemental executive retirement plan. [*Gamble v. Group Hospitalization & Medical Services, Incorporated, Excess Benefit Plan*, 38 F.3d 126 (4th Cir., 1994)] The employer refused to make payments under the excess benefit plans. The court found that both the excess benefit plan and the supplemental executive retirement plan were unfunded excess benefit plans that were exempt from ERISA. Gamble argued that, notwithstanding the language of the plans, the intent of the board was to adopt a plan that would provide excess benefits over all federal limitations, not just the limitations imposed by Code Section 415. He argued that any interpretation which concluded from the terms of the plan that it was limited to providing benefits to make up only for losses caused by Section 415 was based on a "scrivener's error."

The court rejected his arguments:

Both state law and ERISA cases manifest a strong policy that plans be in writing, and for good reason. The parties and beneficiaries should be entitled to plan their financial affairs with some certainty about that to which they are entitled, and fiduciaries should be guided clearly in the administration of plans by a definitive writing and not by the vagaries of oral understandings. See, e.g., *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 1994 U.S. App. LEXIS 25008, *15 (4th Cir., 1994) (observing that informal communications outside of formal plan documents cannot govern a company's ERISA

obligations because otherwise plan documents would no longer ensure necessary predictability).

In *Cinelli*, the board of the employers passed a resolution offering vested supplemental life insurance to its senior management. [*Cinelli v. Security Pacific Corporation*, 61 F.3d 1437 (9th Cir., 1995)] The resolution provided that the agreement with the insurer constituted the supplemental plan. The supplemental plan provided that the employers could terminate the policy at any time, and did not include any vesting language. The supplemental policy of the appellant employee was terminated when he was 78 years old. The court affirmed the grant of summary judgment to the employers. The board's resolution did not amend the plan documents, but merely authorized a new plan, and, therefore, it was not a part of the ERISA plan document. Moreover, an informal, yet binding, ERISA plan was not created in light of the formal plan adopted by the board. The failure to include vesting language was not a mistake because of ERISA's strong preference for written terms.

The court discussed and distinguished *Murata*:

We conclude that in this case the application of the principles of mistake would be inconsistent with ERISA's strong preference for the written terms of the plan and the goal of ERISA to ensure that an employee's rights and obligations can be readily ascertained from the plan documents. In this instance the consideration of parol evidence as to the intent of the Board would be used to alter the unambiguous written terms of a formal plan document. Furthermore, unlike *Murata* where the application of scrivener's error was permissible since the error at issue was a windfall and would not mislead the employee as to benefits, *Cinelli* seeks to establish a mistake as to a fundamental provision of the plan documents. Those documents contain a clear statement of benefits and it would be inconsistent with the goal of ERISA to allow either the employee or employer to attack that statement on the basis of mistake. We decline to apply the doctrine of mistake in this instance to consider the intent of the parties.

In *Kiefer*, the plaintiffs were former employees who had received lump sum retirement benefits. The court found that the retroactive amendment of the plan to provide for use of 120 percent of the PBGC rate to compute the lump sum benefits violated ERISA's anti-cutback provisions, where the plan unambiguously called for use of 100 percent of the PBGC rate. [*Kiefer v. Ceridian Corporation*, 976 F. Supp. 829 (D. Minn., 1997)]

The defendants did not dispute that they used 120 percent of the rate; they maintained, however, that they always intended to do so. The defendants maintained that the court should defer to the plan administrator's reasonable judgment that the plan may have contained a drafting error, and that the error should be disregarded and corrected. The defendants maintained that the administrator had discretion to apply the "equitable doctrine of the scrivener's error" to reform the plan to reflect the intent of the parties:

Without reaching the issue of whether there was actually any error on the part of Defendants, the Court finds the application of the doctrine of the scrivener's error inappropriate in the instant case. This finding is bolstered by the Court's determination that the Plan was unambiguous with regard to use of the 100% rate.

In *Wilson*, former employees sued a company and its pension plan, claiming that they were wrongly denied early retirement benefits. [*Wilson v. Moog Automotive, Inc. Pension Plan and Trust for U.A.W. Employees*, 193 F.3d 1004 (8th Cir., 1999)] The court found that the plaintiffs did not qualify for such benefits under the terms of a plant closing agreement. A plan amendment had attempted to incorporate the terms of the closing agreement, but did so incorrectly, so that the plaintiffs appeared to be eligible for benefits. However, the court concluded that the closing agreement should be considered part of the plan documents. Given the conflict between these two provisions, the court concluded that the closing agreement provision should be followed because it represented the intent of the parties.

There was no evidence that any of the plaintiffs were told, either before or after ratification of the Closing Agreement, that they would be eligible for early retirement. The court concluded that the amendment should be reformed to reflect the intent of the parties, as set forth in the Closing Agreement, and thus agreed that the plaintiffs' claims were properly denied.

In *Gerlib*, the court found that, despite plan language which clearly provided that employees who satisfied the Rule of 75 were entitled to retirement benefit enhancements, the administrator denied the claim. [*Gerlib v. R.R. Donnelley & Sons Company*, 2002 U.S. Dist. LEXIS 10755 (N.D. Ill., 2002)] He concluded that the Rule of 75 language had been included in the plan as a result of a "drafting error." The court held that the administrator's decision was directly contrary

to the plan, was unsupported by the scrivener's error doctrine, and was downright unreasonable.

The company attempted to justify the administrator's decision by the "scrivener's error" doctrine. The court disagreed:

There is no basis to apply the "scrivener's error" doctrine here. First, in contrast to *Murata*, it is not clear that the challenged provision would have created any kind of "windfall" for the plaintiffs who satisfied the Rule of 75, and the result without the reformation is not in any way "absurd"—certainly not so absurd that we should necessarily believe that no one could ever have intended to write the plan as Donnelley did. See *Union Bank v. Wolas*, 502 U.S. 151, 163, 116 L. Ed. 2d 514, 112 S. Ct. 527 (1991) ("Since there was here no contention of a 'scrivener's error' producing an absurd result, the plain text of the statute should have made this litigation unnecessary and unmain- tainable.") (Scalia, J., concurring).

Second, the evidence of the alleged mistake is neither clear, precise, nor convincing....the evidence simply does not compel a finding—indeed it does not even suggest—that the Rule of 75 language made it into the plan documents back in 1994 and then stayed until today, surviving other amendments, merely because it was overlooked by the attorneys and managers who no doubt reviewed and dealt with the plan on a constant basis.

Alleged Oral Modification of an ERISA Plan

In addition to the scrivener's error cases, there are numerous cases involving alleged oral modifications to a plan.

In *Nachwalter v. Christie*, the issue was whether the plan trustees could be estopped from enforcing the written terms of the plans by oral representations that they allegedly made to a beneficiary. [805 F.2d 956 (11th Cir., 1986)] The court held that the written terms of the plans could not be modified by oral agreements.

The court cited an article that summarizes as follows the principles that have led courts to be hostile to claimed oral modifications:

- (1) ensuring the stability and reliability of written plans;
- (2) avoiding the evidentiary problems involved with enforcing oral modifications;
- (3) avoiding the agency problems of determining who has power to bind the plan or fund;
- (4) preventing financial harm to third parties whose interests could be impaired if oral modifications were allowed;
- (5) preserving the actuarial soundness of the

plans; and (6) protecting employees against unexpected, informal employer modifications. [Andrew Y.S. Cheng, Oral Modifications of ERISA-Covered Pension and Benefit Plans: Protection or Deception?, 18 J. Pension Planning & Compliance 28, 33 (1992)]

The writing requirement, though meant to help plan participants, could be used to harm them, *e.g.*, by shielding acts of misrepresentation or fraud. Estoppel, if applied, could prevent a wrongdoer from taking advantage of the writing requirement. The following are the prerequisites of estoppel:

1. The party to be estopped has misrepresented material facts;
2. The party to be estopped was aware of the real facts;
3. The party to be estopped intended that the misrepresentation be acted on, or had reason to believe that the party asserting the estoppel would rely on it;
4. The party asserting the estoppel did not know, nor should it have known, the real facts; and
5. The party asserting the estoppel reasonably and detrimentally relied on the misrepresentation.

[National Companies Health Benefit Plan v. St. Joseph's Hospital of Atlanta, 929 F.2d 1558, 1572 (11th Cir., 1991). *See also* Denniston v. Taylor, 2004 U.S. Dist. LEXIS 1512 (S.D.N.Y., 2004)]

In *Nachwalter*, the plaintiff was a sophisticated corporate insider. In most estoppel cases, the affected participant is an ordinary employee, whose reliance upon the alteration or misrepresentation about coverage is predictable, extensive, and costly. [See Comment, Estoppel Claims Against ERISA Employee Benefit Plans, 25 U.C. Davis L. Rev. 487 (1992). *See also* James v. Pirelli Armstrong Tire Corp., 305 F.3d 439 (6th Cir., 2002)]

The Oral Plan Cases

There is also a substantial body of case law dealing with the question of whether some arrangement, such as a recurrent pattern of severance payments, was or was not an employee benefit plan. [See Note, ERISA: Enforcing Oral Promises to Pay Employee Benefits, 28 B.C.L. Rev. 723 (1987); Jeffrey S. Klein & Nicholas J. Pappas, Informal Severance Pay Plans, 214 NYLJ 3, Aug. 7, 1995]

In *Kenney*, the former employee alleged that his former employer had deducted money from his paycheck for the purpose of funding a pension plan, but then

failed to contribute that money to an actual pension fund. [Kenney v. Roland Parson Contracting Corporation, 28 F.3d 1254 (D.C. Cir., 1994)] The lower court had dismissed the complaint on the basis that it failed to state a federal cause of action because the allegations were insufficient to show that the employer had established a pension plan subject to ERISA. Upon the employee's appeal, the court reversed and remanded for further proceedings, holding that the employer had established an ERISA plan.

The court noted that the employer had paid the employee less than the prevailing wage, in violation of the Davis-Bacon Act, because it was supposedly paying money into a pension fund. The court found that the employee showed that there was a plan established by the employer and that the Dillingham requirements had been met. The court held that distribution by the employer of a brochure describing the plan, together with surrounding circumstances, satisfied the test to prove that a plan had been established. Accordingly, the complaint did state a cause of action under ERISA.

As the statute itself makes clear, however, the plan need not be formalized; the plaintiff can prevail if the existence of a plan can be inferred from the "surrounding circumstances." 29 U.S.C. § 1002(2)(A); *see also, e.g., Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir., 1982) (en banc) (holding that although ERISA requires administrator to maintain written instrument establishing plan, such instrument is "not [a] prerequisite [] to coverage under the Act").

The *Dillingham* court was one of the first to consider the type of "surrounding circumstances" from which one may (or may not) infer that there is an ERISA plan notwithstanding the lack of a formal instrument to that effect. To begin with what it makes clearest, "[a] decision to extend benefits," standing alone, "is not the establishment of a plan or program." *Id.* at 1373. More is required, to wit:

[A] court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits. Some essentials of a plan, fund, or program can be adopted, explicitly or implicitly, from sources outside the plan, fund, or program...but no single act in itself necessarily constitutes the establishment of the plan, fund, or program....

Instead of discounting the evidentiary value of the plan summary, the district court should have inquired whether its distribution, in combination with other surrounding

circumstances, satisfies the Dillingham standard. As the Third Circuit recently described the appropriate inquiry:

[1] internal or distributed documents, [2] oral representations, [3] existence of a fund or account to pay benefits, [4] actual payment of benefits, [5] a deliberate failure to correct known perceptions of a plan's existence, [6] the reasonable understanding of employees, and [7] the intentions of the putative sponsor would all be relevant to determine whether a plan existed. [*Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, 974 F.2d 391, 400 (3d Cir., 1992)]

By our reckoning, in this case at least five of the seven factors—all but numbers [3] and [4]—weigh in favor of the employer having established an ERISA plan. There was arguably also [3] a fund in the picture, created by Parson's withholding of employee wages. To be sure, there was no "actual payment of benefits," but that is not very significant in view of the short period of time involved and the apparent lack of any claim for benefits having been made. Indeed, upon presentation of a claim, Parson might well have paid the benefits due, à la Ponzi, rather than be exposed. In short, virtually every indicator points toward there being a plan.

Thus, the courts have been willing to infer the existence of a plan from the circumstances, even if the plan was not reduced to writing. The prevailing view is that an oral plan can be enforced but an oral modification cannot. Some district courts have been prepared to treat an oral representation by employer representatives about coverage not as a plan modification, but as creating a new plan. [*Adler v. Aztech Chas. P. Young Co.*, 807 F. Supp. 1068 (S.D.N.Y., 1992); *Lipscomb v. Transac, Inc.*, 749 F. Supp. 1128 (M.D. Ga., 1990)]

Conflicting Documents

Cases involving alleged scrivener's errors should be distinguished from cases involving a discrepancy between the written plan documents and the written summary plan description (SPD), although such a discrepancy may provide some evidence that an error was made. In this situation, courts generally protect reliance upon the SPD, even if the SPD states that the plan provisions will prevail in the event of any conflict. [*See, e.g., Hansen v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir., 1991); *Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23 (4th Cir., 1992); *Aiken v. Policy Mgmt.*

Sys. Corp., 13 F.3d 138 (4th Cir., 1993); *Heidgerd v. Olin Corp.*, 906 F.2d 903 (2d Cir., 1990); *Edwards v. State Farm Mut. Auto Ins. Co.*, 851 F.2d 134 (6th Cir., 1988); *Glocker v. WR Grace & Co.*, 974 F.2d 540 (4th Cir., 1992); *Bailey v. Cigna Ins. Co.*, 2004 U.S. App. LEXIS 1539 (5th Cir., 2004) (SPD controlled over conflicting language in plan enrollment guide); *Estate of Fields v. Provident Life and Accident Ins. Co.*, 2001 U.S. Dist. LEXIS 10157 (E.D. Pa., 2001) (in life insurance dispute, proceeds were awarded to beneficiary determined under SPD that conflicted with plan document)] However, if the plan is more favorable to the employee than the SPD, the plan will generally be followed. [*McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566 (11th Cir., 1985); *Bergt v. Retirement Plan for Pilots Employed by MarkAir, Inc.*, 293 F.3d 1139 (9th Cir., 2002)]

In *Bergt*, the court of appeals found that, under the plan master document, the employee was clearly eligible to participate in a retirement plan, because he did not participate in another plan to which the company was contractually obligated to contribute. [*Bergt v. Retirement Plan for Pilots Employed by MarkAir, Inc.*, 293 F.3d 1139 (9th Cir., 2002)] The court further found that the SPD unambiguously prevented him from participating. Therefore, a conflict existed between the master plan document and the SPD, creating an ambiguity as to whether the employee was eligible to participate in the retirement plan. The court held that the unambiguous provisions of the plan master document controlled, as they were more favorable to the employee. The committee thus abused its discretion by refusing to provide benefits under the retirement plan to the employee.

We...conclude that when the plan master document is more favorable to the employee than the SPD, and unambiguously allows for eligibility of an employee, it controls, despite contrary unambiguous provisions in the SPD. The plan master document is the main document that specifies the terms of the plan, and employees should be entitled to rely on its unambiguous provisions. The SPD, on the other hand, should simply summarize the relevant portions of the plan master document. Specifically, we adopt the reasoning of the Fifth Circuit, which stated:

Any burden of uncertainty created by careless or inaccurate drafting of the summary must be placed on those who do the drafting, and who are most able to bear that burden, and not on the individual employee, who is powerless to affect the drafting of

the summary or the policy and ill equipped to bear the financial hardship that might result from a misleading or confusing document. **Accuracy is not a lot to ask.** (Emphasis added) [Hansen v. Continental Ins. Co., 940 F.2d 971, 982 (5th Cir., 1991)]

Furthermore, the law should provide as strong an incentive as possible for employers to write the SPDs so that they are consistent with the ERISA plan master documents, a relatively simple task. *Id.*

In *Feifer*, the employer distributed a benefits program summary to its employees. The long-term disability section did not contain an offset for Social Security or workers' compensation benefits. [Feifer v. Prudential Insurance Company of America, 306 F.3d 1202 (2d Cir., 2002)] The summary contained a disclaimer stating that the summary was for informational purposes only, but the summary was the only written plan document at that time. The employer later received a benefit booklet that did describe the offsets. The court determined that, under ERISA, two employees, who became disabled after receiving the program summary but before the employer received the benefit booklet, were entitled to benefits without offsets. The summary was the plan until the employer received the benefit booklet, because the summary met the written instrument requirement and the definition of a plan under ERISA. The disclaimer did not render the summary a non-plan during the period when it was the only written document describing benefits.

As we have noted, the Program Summary is the only document in the record that existed between January and September 30, 1993, and that described employee benefits. We do not think that an employer can avoid the written instrument requirement by treating this written document describing employee benefits as merely a summary of a plan that is nowhere else in writing. Although the Program Summary contains the disclaimer that it was "not intended to cover all details of the Plan" and that the "actual provisions of the Plan will govern," we reject the notion that this disclaimer renders the Program Summary a non-plan during the period when it was the only written document describing benefits. We held in *Heidgerd v. Olin Corp.* that "it is of no effect to publish and distribute a plan summary booklet...and then proclaim that any inconsistencies will be governed by the plan." 906 F.2d 903, 908 (2d Cir., 1990) (quoting *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir., 1985)). This is especially true where the "plan" allegedly

summarized by the document distributed to employees does not otherwise exist in written form at the time of distribution. Crediting such a disclaimer in this situation would allow an employer effectively to "opt out" of ERISA's requirements despite its establishment of an employee benefits scheme that meets ERISA's definition of a "plan." Also, because an employer could always produce a subsequent document without such a disclaimer, crediting the disclaimer in this situation would allow an employer effectively to use such a subsequent document to make post-hoc changes in plan terms without complying with the plan amendment procedures that employers must specify under 29 U.S.C. § 1102(b)(3).

The defendants argue in the alternative that the plaintiffs may not enforce the terms of the Program Summary without a showing of detrimental reliance upon, or prejudice by, that document. Unlike most other circuits, this Court has not yet decided whether a showing of these factors is ever necessary for a plaintiff to succeed in an action brought under ERISA. See *Layaou v. Xerox Corp.*, 238 F.3d 205, 212 (2d Cir., 2001) (collecting cases); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 909. We note, however, that those courts that have imposed requirements such as reliance or prejudice did so only where plaintiffs sought to enforce provisions other than those that the court deemed "plan" terms. [citations omitted] To put it another way, we are unaware of caselaw to the effect that a plaintiff must show reliance or prejudice to enforce terms of a plan. Such a limitation on the reliance or prejudice requirement is consistent with the principle that an action under ERISA to enforce plan terms sounds in contract, and a plaintiff generally need not show equitable factors such as reliance or prejudice to enforce contractual terms. We therefore conclude that a plaintiff need not show reliance, prejudice, or any other equitable factor to enforce plan terms in a claim under § 1132(a)(1)(B).

In *Burstein*, the court ruled that when the SPD conflicts with the complete, detailed ERISA plan document, a plan participant may nevertheless state a claim for plan benefits based upon terms contained in the SPD. [Burstein v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation, 334 F.3d 365 (3d Cir., 2003)]

...the statute contemplates that the summary will be an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary. To allow the Plan to contain different terms that supersede the terms of the Booklet would defeat the purpose of

providing the employees with summaries. *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907–908 (2d Cir., 1990) (citing 29 U.S.C. § 1022; 29 C.F.R. § 2520.102-2(a) (1989)). In addition to the Eleventh and Second Circuits, the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have all adopted similar views (though somewhat varying in scope, precise context, and extent) that if the SPD language differs from or conflicts with the plan language, it is the SPD language that will control....

We also conclude that a plan participant who seeks to claim plan benefits on the basis of a conflict between an SPD and a plan document need not plead reliance on the SPD. We recognize that other Courts of Appeals that have spoken to this issue have taken differing positions on this question.

The Eleventh Circuit, for example, has declared: “We... hold that, to prevent an employer from enforcing the terms of a plan that are inconsistent with those of the plan summary, a beneficiary must prove reliance on the summary.” *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir., 1992). The First, Fourth, and Seventh Circuits have similarly required reliance....The Sixth Circuit, by contrast, has disclaimed the necessity of reliance....The Second Circuit has not provided a definitive answer to this question.

In some cases, an employee contemplating retirement receives from the plan administrator a written benefit statement mistakenly showing retirement benefits that are larger than the employee is actually entitled to receive. Claims for the higher (incorrect) benefit have generally been rejected on the basis that estoppel only applies to plausible interpretations, not to modifications, and that a plan cannot be modified by a writing that is not a formal amendment. However, in some cases, the facts may lead the court to conclude that the aggrieved participant may recover on a theory of “detrimental reliance” on the incorrect estimate.

Comments by Professional Organizations

In a March 17, 2008, letter to the IRS, the American Institute of Certified Public Accountants (AICPA) said that scrivener’s errors should be self-correctable under EPCRS. Section 1101 of the Pension Protection Act of 2006 (PPA) gives the IRS broad authority and encouragement to expand EPCRS. AICPA expressed concern that uncorrected errors may “wreak havoc” on small businesses as they wrestle with increasingly complex regulations. AICPA recommended that the IRS adopt a definition of scrivener’s errors; establish methods to correct the resulting issues under the self-correction program; and adopt a presumption that,

absent evidence to the contrary, the sponsor intended no changes to policies and procedures when amending plan documents to comply with changes in the law or a change in plan document provider.

The American Society of Pension Professionals and Actuaries (ASPPA) also sent comments, in a letter of April 25, 2008, to W. Thomas Reeder, Treasury Benefits Tax Counsel, and William Bortz, Associate Benefits Tax Counsel. ASPPA pointed out that, under Rev. Proc. 2006-27 section 4.05, correction by use of a retroactive plan amendment without IRS approval is limited to four specified operational failures (compensation limit, hardships, loans, early inclusion). A sponsor can correct a variety of failures with a retroactive plan amendment with IRS approval, under VCP or Audit CAP. The plan amendment must comply with the qualification rules, including 411(d)(6). In determining whether a retroactive amendment is permissible, the IRS considers various factors, including who is affected; reductions in accrued benefits; consistent operations; supporting documentation; required or discretionary; expectations of the participants; and the impact of the amendment on the plan’s qualification.

ASPPA suggested that correction by retroactive amendment should be permitted where (1) there is a failure to provide for a certain type of contribution that was in fact made; (2) the plan contains provisions that are internally inconsistent, or omits provisions that are clearly required for the documented provisions to make sense; (3) the document contains terms that are inconsistent with a collective bargaining agreement or corporate transaction document; and (4) the plan has been administered incorrectly, and the administration is more favorable to NHCES than the document provision.

Conclusion

Plan drafting mistakes are a fact of life. The IRS should issue clear guidelines allowing inadvertent errors to be corrected, without penalty, and without prior IRS approval, in clearly defined situations where there is strong evidence of the mistake. In other cases, where the evidence is less clear, or where recognition of the error would significantly impair participants’ reasonable expectations, correction should be subject to IRS supervision and graduated—though reasonable—sanctions. Pretending that honest mistakes never happen is not responsible, and zero tolerance is not an appropriate standard for those hardy employers who are still prepared to brave the slings and arrows of ERISA compliance. ■