No. 10-55161

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES D. SKINNER and GREGORY A. STRATTON, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

vs.

NORTHROP GRUMMAN RETIREMENT PLAN B and ADMINISTRATIVE COMMITTEE OF NORTHROP GRUMMAN RETIREMENT PLAN B,

Defendants-Appellees.

Appeal from the United States District Court
For the Central District of California
Case No. 2:07-CV-03923-JFW-AGR

Brief *Amici Curiae* of United Policyholders in support of the Appeal of Plaintiffs-Appellants Petition for Panel Rehearing or for rehearing En Banc

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I.
INTRODUCTION

When it enacted ERISA one of the congressional goals was to ensure that plan participants had accurate information regarding their rights and obligations. To that end congress mandated that ERISA plan administrators provide participants with a Summary Plan Description ("SPD"). To effectuate the congressional purpose 29 U.S.C. § 1022(a) required the SPD to contain an accurate statement of the participant's rights and obligations under the Plan.

At the time *CIGNA Corp. v. Amara* 131 S.Ct. 1866 (2011) was decided courts in at least ten circuits stringently enforced the requirement for accurate SPDs, as well as the expectations of the participants receiving them. These courts did so by resolving material discrepancies between the SPD and the actual plan in favor of the SPD. As such, employees could rely on their SPDs to provide accurate information regarding their benefits, and employers and insurers had a powerful incentive to comply with their legal obligation to ensure that the SPDs they distribute are reliable.

Nothing in *Amara* gives any suggestion that the Supreme Court intended to change the well established principle that the SPD governs over the plan. Rather, when the issue was addressed at oral argument it was assumed that the language of the SPD governed. *Amara* only changed the mechanism by which the courts should enforce the requirement for an accurate SPD, from a 29 U.S.C. § 1132(a)(1)(B) claim

for plan benefits to a 29 U.S.C. § 1132(a)(3) claim for equitable relief.

The panel opinion here changes settled law by requiring fraud or mistake before the terms of the SPD can be enforced. In doing so the panel opinion puts this Court in conflict with the laws of nine other circuits which resolve material discrepancies between the plan and SPD in favor of the participant's reasonable expectations. The panel opinion also ignores the congressional mandate that SPDs be accurately drafted and places the burden of an inaccurate SPD on a party with no control over its content.

United Policyholders respectfully requests that the panel reconsider its decision, and that this Court as a whole reconsider the issue *en banc*.

II.
INTEREST OF THE AMICUS CURIAE

United Policyholders is a non-profit organization that acts as an information resource for insurance consumers throughout the country. United Policyholders is funded by foundations and donations from individuals and businesses, but it does not accept funding from insurance companies. Through its various programs, United Policyholders (a) provides tools and resources for helping consumers solve insurance problems; (b) promotes disaster preparedness and insurance literacy through outreach and education; and (c) fights for strong legal protections for insurance beneficiaries and promotes insurance consumer interests.

As part of its mission, United Policyholders is concerned about the implementation and application of laws and rules under ERISA. A substantial percentage of the insurance market is governed by ERISA, and rules and decisions under ERISA affect millions of insureds.

United Policyholders is aware that most participants of insured ERISA plans never get to see the actual plan or policy. Instead, they usually rely on the SPD for a description of their rights under the plan. As such, it is critical for participants of insured plans that the SPD be an accurate statement of the benefits available and the circumstances which might cause benefits to be lost or reduced.

Under the law as it existed prior to the panel's opinion, material discrepancies between the SPD and the plan would be resolved in favor of the SPD. United Policyholders is concerned that the panel's opinion would change this result, making it impossible for plan participants to rely on the SPD and removing the incentives for employers and insurers to ensure that SPD's are accurately drafted. As such, it is respectfully requesting that the panel opinion be reconsidered.

The present brief was authored entirely by the undersigned counsel. No other person contributed to the writing of this brief, and no other person contributed money to fund this brief.

III.
ARGUMENT

A. A Key Congressional Goal in Enacting ERISA Was to Ensure that Employees Had Accurate Information about their Benefit Plans, and Requiring an Accurate SPD was the Chosen Means of Meeting this Goal

When it enacted ERISA congress intended to "remedy certain defects in the private retirement system" which threatened individual pension and benefits rights. *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 249 (6th Cir. 1996) (quoting from House Report No. 93-533, reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4646; 1973 WL 12549, 1 (hereinafter "House Report")). One of these defects "was the inadequacy of the limited data available to employees under pre-ERISA law," *Helwig*, 93 F.3d at 249, and the "effectiveness of communication of plan contents to employees." House Report, 1973 WL 12549, 7.

The hearings on which ERISA was based indicated that many employees did not know their rights and responsibilities under pre-ERISA benefit plans. "Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan provisions, often cannot comprehend them because of the technicalities and complexities of the language used." House Report, 1973 WL 12549, 7. Addressing this problem, "Congress sought to create disclosure requirements

which would enable the individual participant to 'know[ ] exactly where he stands with respect to the plan-what benefits he may be entitled to, [and] what circumstances may preclude him from obtaining benefits ...'" *Helwig*, 93 F.3d at 249 (quoting from House Report, 1973 WL 12549, 10).

Consistent with this, in its "Congressional findings and declaration of policy" ERISA states that "[i]t is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto . . ." 29 U.S.C. § 1001. As the Supreme Court noted, "one of ERISA's central goals is to enable plan beneficiaries to learn their rights and obligations at any time." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995).

"Congress chose to implement its goal of full disclosure by requiring that all employers create and distribute 'Summary Plan Descriptions' ('SPDs') of all benefit plans." *Helwig*, 93 F.3d at 249. ERISA mandated that the SPDs be provided "to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan." 29 U.S.C. § 1021(a). The SPDs were required to "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." 29 U.S.C.A. § 1022. In *Schoonejongen*, this Court noted that ERISA contained "a comprehensive set of 'reporting and disclosure' requirements," a central component of which "requires that plan administrators periodically furnish beneficiaries with a Summary Plan Description, see 29 U.S.C. § 1024(b)(1), the purpose being to communicate to beneficiaries the essential information about the plan." *Schoonejongen*, 514 U.S. at 83 (citation omitted).

ERISA requires the SPD, but not the actual plan, to be distributed to employees. As such, "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." *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907 (2nd Cir. 1990). *Also*, *Alday v. Container Corp. of America*, 906 F.2d 660, 665 (11th Cir. 1990) ("The SPD is the statutorily established means of informing participants of the terms of the plan and its benefits.").

B. Ten Circuit Courts of Appeal, Including the Ninth Circuit, Enforce the Requirement for an Accurate SPD by Resolving Conflicts Between the SPD and the Plan in Favor of the SPD

At least ten circuit courts of appeal have held that, in order to enforce the congressional intent that SPDs accurately inform plan participants of their rights, conflicts between the SPD and the plan are resolved in favor of the SPD.

The first such court was *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566 (11th Cir. 1985), where the Eleventh Circuit held that if there was a conflict between the SPD and plan the insurer had violated ERISA's requirement "that the summary shall be an accurate and comprehensive document that reasonably apprises the employees of their rights under the plan." *McKnight*, 758 F.2d at 1570. The *McKnight* Court stated that an SPD "does not fully comply with ERISA if it is not an accurate interpretation of the original pension plan." *McKnight*, 758 F.2d at 1570. As such, *McKnight* held that the employee had the right to rely on the SPD, and that it would be enforced over conflicting plan language:

> It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document, and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet. *McKnight*, 758 F.2d at 1570.

McKnight was followed by the Sixth Circuit in *Edwards v. State Farm Mut. Auto. Ins. Co.* 851 F.2d 134, 136 (6th Cir. 1988) ("This Circuit has decided that statements in a summary plan are binding and if such statements conflict with those in the plan itself, the summary shall govern"). In *Heidgerd* the Second Circuit joined the Sixth and Eleventh Circuits in holding that "[t]o 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*, 906 F.2d 907-08.

McKnight was also followed in the Fifth Circuit by *Hansen v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir. 1991). *Hanson* stressed that "ERISA requires, in no uncertain terms, that the summary plan description be 'accurate' and 'sufficiently comprehensive to reasonably apprise' plan participants of their rights and obligations under the plan." *Hanson*, 940 F.2d at 981 (quoting from 29 U.S.C. § 1022). *Hanson* held this meant that the employees had a right to rely on the SPD as an accurate statement of their rights:

> Under Continental's proposed rule the summary would not need to be accurate or comprehensive-if there were an ambiguity in the summary or an inaccuracy that put the summary in conflict with the policy, that ambiguity or inaccuracy would be cured by the policy itself. The result would be that before a participant in the plan could make any use of the summary, she would have to compare the summary to the policy to make sure that the summary was unambiguous, accurate, and not in conflict with the policy. Of course, if a participant has to read and understand the policy in order to make use of the summary, then the summary is of no use at all. *Hansen*, 940 F.2d at 981-982.

In *Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23 (4th Cir. 1992), the Fourth Circuit followed *McKnight*, noting "that the courts, in construing these provisions of the Act, have uniformly held that the SPD was the statutorily established means of informing participants of the terms of the plan and its benefits, and the employee's primary source of information regarding employment

benefits." *Pierce,* 979 F.2d at 27 (4th Cir. 1992) (citations and attributions omitted). As such, *Pierce* held that failing to resolve conflicts between the SPD and the plan in favor of the SPD "would be, as the Congress recognized, grossly unfair to employees and would undermine ERISA's requirement of an accurate and comprehensive summary." *Pierce*, 979 F.2d at 28.

In *Burstein v. Retirement Account Plan For Employees of Allegheny Health Educ. and Research Foundation*, 334 F.3d 365, 378 (3rd. Cir. 2003) the Third Circuit "join[ed] with the other Courts of Appeals that have considered this issue" on the grounds that "[t]he ERISA provision governing summary plan descriptions expresses Congress's desire that the SPD be transparent, accurate, and comprehensive." *Burstein*, 334 F.3d at 378. The courts of appeal for the Seventh, Eighth and Tenth Circuits have also accepted that, where there is a conflict between the SPD and the plan, the plan governs. *E.g. Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1518 (10th Cir. 1996) ("Because the SPD is such an important vehicle in ERISA's attempt to fairly regulate employment benefits, courts have held that the terms of the master plan cannot control an SPD's provision that is ambiguous or in conflict with the master plan document."); *Senkier v. Hartford Life & Acc. Ins. Co.*, 948 F.2d 1050, 1051 (7th Cir.,1991) ("The statute requires that the summary plan document be 'sufficiently accurate and comprehensive to reasonably apprise' the plan participants of their rights under the plan. 29 U.S.C. §

1022(a)(1)."); *Barker v. Ceridian Corp.*, 122 F.3d 628, 633 (8th Cir. 1997) ("Because of the importance of disclosure, in the event of a conflict between formal plan provisions and summary plan provisions, the summary plan description provisions prevail").

At least until the Opinion at issue was handed down, this Court agreed with this principle. In *Bergt v. Retirement Plan for Pilots Employed by MarkAir, Inc.*, 293 F.3d 1139, 1145 (9th Cir. 2002) this Court cited to *Chiles*, *Heidgerd*, *Edwards*, and *McKnight* and concluded that, in the event of a conflict between the SPD and the plan, the document more favorable to the employee would control:

> In these cases, the SPD conflicted with, and was more favorable to the employee, than the plan master document. Instead of relying on extrinsic evidence, however, these courts held that it would be unfair to have the employees bear the burden of a conflicting SPD and plan master document and, thus, decided that the provision more favorable to the employee controlled.

Bergt, 293 F.3d at 1145. The Ninth Circuit concluded that it would "follow this same reasoning." *Id.*

C. *Amara* Did Not Change the Prevailing Law that the SPD Prevailed over the Plan, It only Modified the Procedural Mechanism By Which this was Accomplished

In *CIGNA Corp. v. Amara*, 131 S.Ct. 1866 (2011) the Supreme Court addressed a case where, like here, the employer had made a number of statements about the plan, including the publication of an SPD, which materially differed

from the plan. The district court had reformed the plan so it was consistent with Cigna's disclosures regarding the plan:

> The District Court agreed that the disclosures made by CIGNA violated its obligations under ERISA. In determining relief, the court found that CIGNA's notice failures had caused the employees "likely harm." The Court then reformed the new plan and ordered CIGNA to pay benefits accordingly.

Amara, 131 S.Ct. at 1870-1871. The district court found authority for reforming the plan "in ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (authorizing a plan 'participant or beneficiary' to bring a 'civil action' to 'recover benefits due to him under the terms of his plan')." *Id.*

The Supreme Court did not disturb the well established precedent that the terms of the SPD prevailed over the plan, or suggest that the district court erred in reforming the plan to conform to Cigna's disclosures about it. The actual issue before the Supreme Court was a different one; whether the plaintiffs had to show that all of the class members had read the misleading SPD (i.e. show actual reliance), or whether it would be sufficient to establish that the misleading SPD would result in "likely harm" to the class members. "We agreed to decide whether the District Court applied the correct legal standard, namely, a 'likely harm' standard, in determining that CIGNA's notice violations caused its employees sufficient injury to warrant legal relief." *Amara*, 131 S.Ct. at 1871.

The legal principal that the SPD governed over the plan was not questioned

in defendants' briefs. At oral argument Cigna's counsel briefly attempted to argue that a "disclaimer" in the SPDs which stated that the plan would govern in the event of a conflict between the documents should be given effect:

> MR. OLSON: That's correct. And the SPDs, the two SPDs themselves on page 922a and 938a of the Joint Appendix, specifically say that if there is any discrepancy between the SPD and the plan the plan governs. The language is at the bottom of, for example, at the bottom of 922a. So –

(*Amara* Transcript, pg. 12:1-6). Justice Kagan reminded Mr. Olson that ERISA required that the SPD be accurate, and Cigna could not negate that legal requirement via a disclaimer that the SPD might not be accurate:

> JUSTICE KAGAN: But the SPD can't negate the force of ERISA, and if ERISA says that the summary has to be consistent with the plan documents nothing in the SPD can negate that requirement.

(*Amara* Transcript, pg. 12:7-10).

The Supreme Court did, however, reject the prevailing understanding that the plan could be reformed to comply with the SPD in the context of the usual 29 U.S.C. § 1132(a)(1)(B) claim for plan benefits. "[W]e conclude that the summary documents, important as they are, provide communication with beneficiaries *about* the plan, but that their statements do not themselves constitute the terms of the plan for purposes of § 502(a)(1)(B)." *Amara*, 131 S.Ct. at 1878. As such, it reversed the District Court, which had relied exclusively on § 1132(a)(1)(B).

The District Court then stated that the relief granted by the District Court,

reforming the plan to conform to Cigna's disclosures, would have been available under a 29 U.S.C. § 1132(a)(3) claim for "appropriate equitable relief:"

> Nonetheless, we find that a different equity-related ERISA provision, to which the District Court also referred, authorizes forms of relief similar to those that the court entered. § 502(a)(3), 29 U.S.C. § 1132(a)(3).

Amara 131 S.Ct. at 1871.

There was nothing in the *Amara* opinion suggesting it was changing the law of ten circuits which hold that the SPD governs over the plan. To the contrary, in Section III of its opinion the Court broadly describes the equitable relief available under § 1132(a)(3) when the SPD differs from the plan. It never stated that reformation of the plan to conform to the summary would only be available where there was fraud or mistake. To the contrary, it at least implied that this remedy would be available where the SPD was simply misleading. "First, what the District Court did here may be regarded as the reformation of the terms of the plan, in order to remedy the false or misleading information CIGNA provided." *Amara* 131 S.Ct. at 1879 (emphasis added).

D. The Panel Opinion Changes Well Established Law and Creates a Conflict with the Law in Nine Circuits

The panel opinion here changes well established law. It changes the rule in this Court's *Bergt* decision that it would be "unfair to have the employees bear the burden of a conflicting SPD and plan master document." *Bergt*, 293 F.3d at 1145.

It brings the Ninth Circuit into conflict with the Courts of the Second, Third Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits which, to further the congressional requirement of accurate SPDs, protect a participant's reasonable expectation and place the burden of misleading SPDs on the party responsible for drafting it, enforce the terms of the SPD over the plan.

IV.
CONCLUSION

For the foregoing reasons, United Policyholders respectfully requests that the panel grant rehearing or that the Ninth Circuit grant rehearing *en banc*.

Dated: April 6, 2012

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 32(a)(7)(C)(i) this brief is reproduced using Times New Roman 14 point type, a proportionately spaced typeface. The lines are double-spaced and the word count is approximately 3,451 words.

Dated: April 6, 2012

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CERTIFICATE
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I, Mildred Schwam, certify that this brief is identical to the version submitted electronically on April 6, 2012, pursuant to Rule 6(c) of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases.

Date April 19, 2012

Signature Mildred Schwam