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Contract Disclaimers in ERISA
Summary Plan Documents: A Deceptive Practice?

James F. Stratman†

The Employment Retirement Income Security Act requires employers to provide employees covered by a retirement insurance plan with a summary of that plan, known as a “summary plan document” (“SPD”). The author argues that although the legislative intent behind SPDs is to promote simple and accurate communication of the provisions of the comprehensive plan, many employers circumvent this purpose by using contract disclaimers in their SPDs. When a company fails to state explicitly that an SPD is not a contract in its disclaimers, that company may lure some employees into thinking that they have benefits they do not have, or that they have met eligibility obligations which they have not met. The Article asserts that research concerning how readers interpret disclaimers has considerable legal relevance. Next, the Article presents the results of a study which focused on readers’ perception and understanding of a contract disclaimer used near the end of an SPD. The author concludes, supported by the results of the study, that the use of contract disclaimers works directly against accurate disclosure of comprehensive plans since contract disclaimers almost invariably function to screen details from the reader.

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ERISA "Plain Language" Rules for Summary Plan Documents

A. Purpose of the Rules

Ever since the passage of the Employment Retirement Income Security Act ("ERISA") in 1974, employers have been required to provide their employees with what are known as "summary plan documents" ("SPDs"). Usually printed as short brochures, folders, leaflets or booklets, SPDs describe the rights and obligations of employees upon their retirement. Typically, SPDs describe the conditions under which the employee is eligible to collect a variety of insurance benefits, contributions the employee must make toward insurance premiums, if any, length of coverage, and so on. SPDs are presented to the employee at some point before retirement, usually when the employee has worked an obligatory number of years and has met other requirements to become eligible.

One purpose of requiring an employer to provide an SPD to the employee is to make it easier for the employee to understand the exact terms of her employment and retirement, without getting confused by the "legalese" of a comprehensive insurance policy. The congressional testimony behind ERISA makes this purpose quite clear:

Descriptions of plans furnished to employees should be presented in a manner that an average and reasonable worker participant can understand intelligently. It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets. 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 . . . .

Experience has . . . demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan—what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what pro-

2. Id. §§ 1021-1022.
cedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his funds have been entrusted.3

The intention behind the legislation is thus that a responsible SPD should not merely “disclose” information; it should also accurately communicate all of the provisions of the original, comprehensive plan, albeit in less technical language.4 To insure accuracy in communication, ERISA included “plain-language” regulations specifying not only what information5 the SPD must contain but also how6 that information should be displayed, e.g., what size typeface can be used, so as to be most easily understood.

B. Contract Disclaimers and Conflict with Purpose

Unhappily, however, the precise legal relationship between the SPD and the original plan has never been clarified. As a result, controversy surrounds the use and design of SPDs. Increasingly, disputes about the contractual status of representations made in SPDs are appearing in the courts.7 The basic problem is that ERISA provisions do not clearly state whether SPDs constitute binding contractual agreements between the trustees of the plan and the employee in the same way that the original plan documents constitute binding contractual agreements. Ironically, the result of omitting such a clarification from ERISA is that many SPDs are now threatened by the same obscurity, double-talk and ambiguity that is the bane of the larger, original plan documents. For though the plain language provisions of ERISA8 and its implementing regulations9 indicate what information SPDs must include, along with a few meager requirements for style, these provisions are written in rather general language. The provisions are therefore subject to a wide, if not exasperating, variety of interpretations. In the interest of “simplification,” for example, SPD writers may hint that the comprehensive plan contains types of

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4. The distinction between “disclosure” and “communication” as applied to plain language laws is discussed in C. FELSENFELD & A. SIEGEL, WRITING CONTRACTS IN PLAIN ENGLISH 40-43 (1981). A recent study has shown that, by one estimate, more than 96% of current collective bargaining agreements are difficult, if not impossible, for employees to read. Suchan & Scott, Unclear Contract Language and its Effect on Corporate Culture, 29 BUS. HORIZONS 20 (1986).
6. Id. § 2520.102-2(b).
coverage which in fact it does not, all the while arguably remaining within the framework of ERISA plain language provisions.

The pertinent provisions and implementing regulations of ERISA are as follows:

The summary plan description . . . shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. . . . The summary plan . . . shall contain . . . a description of the relevant provisions of any applicable collective bargaining agreement . . . and circumstances which may result in disqualification, ineligibility, or denial or loss of benefits . . . .

The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed . . . .

To be sure, upon reading these provisions, plan trustees may carefully design the SPD as an exact, mirror image of the comprehensive plan. However, other, perhaps less scrupulous employers, motivated by the desire to keep their plans financially healthy, may be tempted to use the SPD as a screen against potentially expensive employee claims. Such SPDs might on the surface appear to comply with ERISA provisions, but through various devices fail to disclose actual provisions.

One such protective screening device is a contract disclaimer.

Perhaps the key phrase is in section 1022(a)(1): "sufficiently accurate." As one recent commentator notes, precisely when a summary plan description statement is "sufficiently accurate" is not addressed in the Department of Labor's regulations. Instead, the courts have been left as the arbiters of statutory compliance. Suffice it to say that no court has held that "sufficiently accurate" means less than "accurate."

To be sure, upon reading these provisions, plan trustees may carefully design the SPD as an exact, mirror image of the comprehensive plan. However, other, perhaps less scrupulous employers, motivated by the desire to keep their plans financially healthy, may be tempted to use the SPD as a screen against potentially expensive employee claims. Such SPDs might on the surface appear to comply with ERISA provisions, but through various devices fail to disclose actual provisions.

One such protective screening device is a contract disclaimer.\textsuperscript{14}

\begin{itemize}
  \item 10. 29 U.S.C. § 1022(a)(1) & (b).
  \item 11. 29 C.F.R. § 2520.102-3.
  \item 12. \textit{Id.} § 2520.102-2(b).
  \item 13. S. BRUCE, supra note 7, at 352.
  \item 14. The contract disclaimer seems to be in widespread use, but we are not aware of any statistics on the matter.
\end{itemize}
Though its precise purpose varies with the purposes of the plan writers, its generic purpose is to deny that the SPD, a simplified version of the plan, has any contractual status. Depending upon the location of the disclaimer in the SPD, its wording, and other factors, the disclaimer may be more or less salient and explicit. For example, if the plan trustees wanted the employees to think that the SPD itself presented enforceable provisions—in particular, provisions which the employee might view as generous or favorable—the trustees might word the disclaimer in such a way that the employee would not clearly understand what it meant and would not read the disclaimer as a denial of contractual liability.

Consider the disclaimer that was discussed by the Eighth Circuit Court of Appeals in Anderson v. Alpha Portland Industries: 15

Complete details of the Plan are contained only in the Company's Revised Retirement Plan Dated April 1, 1957, which instrument governs the Plan. . . . All statements in the foregoing outline and explanations are qualified by reference to the Plan itself. 16

The terms chosen here need to be examined. Will ordinary readers without legal training understand that the phrases “governs the Plan” and “qualified by reference” mean that the SPD has no contractual status? The Anderson court found the disclaimer to be “strong,” 17 apparently indicating that the court felt the disclaimer constituted a fair warning to the employee that the representations in the SPD were not contractual.

However, this disclaimer easily could have explicitly informed the employee that the representations in the SPD were not contractual: it might have said, “This outline is not your official contract. Therefore, it is not a fully reliable statement of your rights and obligations.” As it is, this disclaimer merely informs the employee that the SPD is not complete. On the basis of its present language, some readers may conclude that the SPD is a part of, or a mere extension of the “Plan”; they may infer that its “outline” accurately represents all of their important benefits and obligations, and that the Plan merely fills in very minor details. Moreover, if they believe the “outline” to be a mere extension of the Plan, readers may be far less likely to consult the Plan itself. The disclaimer language thus can have the effect of blunting employee interest in reading the Plan by leaving employees with a false sense that they have succeeded in familiarizing themselves with its contents.

More alert employees who encounter such a disclaimer might ask: “Qualified how? Are benefits which appear to be offered in the summary nevertheless gutted in the comprehensive document?” Readers who accurately perceive the legal intent of this language—to deny the contrac-

16. Id. at 1299-1300 n.13 (emphasis added) (quoting Van Orman v. American Ins. Co., 680 F.2d 301, 304 (3d Cir. 1982)).
17. Id. at 1299 n.13.
tual status of the SPD—may be motivated to investigate the Plan itself and will not rely solely on the language in the SPD.

Consider another illustration: Suppose that a particular SPD states that an eligible employee will receive ten years of medical insurance coverage upon retirement; however, the SPD says nothing one way or the other about whether the benefit can be cancelled and, if it can, under what conditions. Suppose further that, in contrast to the SPD, the comprehensive plan documents plainly state that the employer may revoke these medical benefits without notice.

Under these conditions, a contract disclaimer placed in the SPD arguably allows an employer who revokes these benefits to say that he never misinformed or misled the employee and that he satisfied ERISA's rules for disclosure. He may argue that the disclaimer directed the employee to read the actual plan documents, which spell out complete details, including the employer's right of cancellation. In other words, the argument is that the employer has passed no misinformation. What is disturbing about this scenario is that it is not far-fetched. The Ninth Circuit recently decided a case with similar facts. In the face of such problems the question becomes: Should these kinds of disclaimers be allowed at all?

Other examples demonstrate something of the variety of innuendo possible in disclaimers. Anderson discussed another disclaimer to determine if it satisfied ERISA's rules of disclosure. The disclaimer is as follows:

[T]he purpose of this summary is to describe the Plan to you in non-technical terms. It is intended to give you enough information to answer most of the questions you are likely to have. However, if we covered every detail of the Plan, it would no longer be a summary, but as technical as the full text itself; so if you have a specific question you should consult the Plan document.

This disclaimer's tone is smooth and cooperative. However, as in the last example, there is no explicit statement that the SPD is not the contract. One commentator notes that "the fact that a catch-all notice may be contained in an SPD that the full plan is available for inspection is generally not enough to constitute constructive notice of inconsistent terms." In Anderson, the employer's position apparently was that this text constituted a fair contract disclaimer for the ordinary reader. But would the ordinary reader conclude anything in particular about the contractual status of the benefits set forth in the SPD from this language? More importantly, does this disclaimer really simplify the reader's understand-

18. Bower v. Bunker Hill, 725 F.2d 1221 (9th Cir. 1984); see also discussion of Bower, infra pp. 359-61.
19. 725 F.2d at 1300 n.13.
20. S. BRUCE, supra note 7, at 394.
ing of his retirement rights and obligations? Or does its use in fact run
counter to the fundamental communication goals of ERISA?

As a final example, one particularly onerous practice of some insur-
ance companies is to include contract disclaimers in documents that also
provide a place such as a signature box for employees to sign. The prac-
tice is suspect because many unsophisticated persons assume that any
document with a place for a signature is official or legally binding. Thus,
if employees fail to grasp the intent of the disclaimer, these signers may
be deceived into believing that what is not legally the contract actually is
the contract. In fact, a number of subjects in our experimental research
who were asked to read an SPD without a signature box concluded that
it was “not a contract” because, in their words, “there was no place to
sign.”

The practical, clear question, then is: What does the ordinary
reader think various kinds of disclaimer language mean? Whether this
question has legal relevance depends upon whether plain language laws
adopt a “subjective” or “objective” standard.21 The subjective standard
focuses upon what effects a disclaimer has upon the reader; the objective
standard focuses upon observable, verifiable features of the text of a dis-
claimer. It is clear that both subjective and objective standards have
been established for SPDs in general and disclaimers in particular.
ERISA employs a subjective standard when it describes the need for a
format “calculated to be understood . . . which does not have the effect of
misleading, misinforming, or failing to inform.”22 Hillis v. Waukesha Ti-
tle Co. also adopts a subjective standard.23

ERISA utilizes an objective standard when it specifies text features:
“restrictions of plan benefits shall be described or summarized in a man-
ner not less prominent than the style, captions, printing type and promi-
nence used to describe or summarize plan benefits.”24 In Van Orman v.
American Insurance Co. the court held that an SPD provision was ade-
quate based solely upon consideration of the language in relevant book-
lets and letters, without reference to the effects of this language on
readers.25

Given the existence of both subjective and objective standards for
evaluating SPDs, this Article argues that research addressing the way
readers interpret disclaimers has considerable legal relevance. As sug-

21. See C. FELSENFELD & A. SIEGEL, supra note 4; Bowen, Duffy & Steinberg, Analyzing the Various
Approaches of Plain Language Laws, COMM. DESIGN CENTER, TECHNICAL REP. NO. 29
(1986); Scheibal, The Effectiveness of Plain English Laws: A Legal Perspective, 23 J. OF BUS. COMM.
57 (Spring 1986); Timm & Oswald, Plain English Laws: Symbolic or Real?, 22 J. OF BUS. COMM. 31
(Summer 1985).
25. 680 F.2d 301, 308 (3d Cir. 1982).
gested above, when a company fails to state *explicitly* that an SPD is *not a contract* in its disclaimer, that company may lure some employees into thinking that they have benefits they do not have, or that they have met eligibility obligations which, in fact, they have not met.

Before the Article turns to its study, it is important to emphasize that ERISA provisions do not explicitly prohibit the use of these contract disclaimers. However, as noted above, ERISA regulations do prohibit design or format practice for SPDs which has the "effect of misleading" employees. Nevertheless, partly because of a lack of explicit prohibition by ERISA, retirement plan trustees appear more or less free to word their disclaimers in any way they choose. As we can see from the examples above, up to now plan trustees have been able to broaden or narrow the scope of their disclaimer through the use of modifying language, or use other linguistic devices such as vague pronouns to screen their denial of contractual liability from view. Apparently, the tacit but now controversial assumption behind this use of disclaimers is that SPDs do *not* have to be completely accurate reflections of the original plans so long as the inaccuracy is acknowledged or implied in a disclaimer. In other words, the SPD may selectively summarize the comprehensive plan and thereby report only part of the employees' rights or the company's obligations. Given the silence of ERISA on the use of disclaimers, employee rights and plain language activists may wonder if the effort started by ERISA to clarify the language of SPDs has not amounted to a hoax to provide lawyers with larger territory for litigation and profit. Instead of mandating SPDs as the solution to the benefit communication problem, perhaps ERISA should have laid down guidelines for simplifying the full plans themselves.

Since the fundamental purpose of ERISA is to require effective communication, and not mere "disclosure," of employees' retirement plans, *any* use of disclaimers seems to turn ERISA on its head. This conclusion has been reached in at least one case, *Zittrouer v. Uarco Inc. Group Benefit Plan.* There the court strongly and directly condemned the specious use of a disclaimer to avoid the obligation to disclose certain information in the SPD:

Defendant [Uarco] relies on language contained in the booklet which

26. 29 C.F.R. § 2520.102-2(b). S. BRUCE, *supra* note 7, comments that "[w]hile the regulations do not prohibit disclaimers *per se*, they do require that limitations on a plan's benefits be contained directly in the text describing the benefit offer, or else be directly cross-referenced in the description of the benefit offer. The type of overall limitation that a disclaimer attempts to effect, namely, that there may be other unspecified limitations on a benefit, is not in compliance with [the] regulation." *Id.* at 399 (footnote omitted).

27. S. BRUCE, *supra* note 7, remarks that to "allow a plan to avoid [the] statutory duty through a boilerplate disclaimer of completeness or accuracy would be to re-allow the equivocation that Section 102 sought to remove from summary booklets issued to employees." *Id.* at 397.

states that the booklet "describes the highlights of the [Uarco] Plan" and that "Medical Benefits are described fully in the Plan Document." This focus misses the point. By law defendant is required to include within the summary plan "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits...." 29 U.S.C. § 1022(b). Defendant's failure to do so is at best gross negligence and at worst intentional deception through concealment or inaction. The fact that defendant's summary plan included the quoted disclaimers does not relieve the defendant of the statutory requirement of disclosure. To allow a plan to avoid statutory requirements of disclosure by including disclaimers of this sort would negate one of ERISA's major goals, protection of employees and beneficiaries. The court holds disclaimers of this sort are invalid in light of ERISA's requirements of disclosure.29

The Zitzner court appears to issue a general condemnation of contract disclaimers, a viewpoint with which not all courts agree.30 However, in McKnight v. Southern Life & Health Insurance Co. the court similarly remarked that

"It is of no effect to publish and distribute a ... 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 [would] flow to the employee for reasonably relying on the summary booklet."31

Although McKnight does not refer explicitly to the use of disclaimers, it seems to reject them in principle. The courts' condemnation is sufficiently broad to make litigators wonder how persuasive these cases would be for the general claim that disclaimers are invalid. Alternatively, it remains conceivable that some kinds of disclaimers would be understandable—if carefully tested and designed. But empirical testing for comprehension is seldom carried out, and a tremendous variation in types of contract disclaimers is possible.

II
THE PURPOSE OF THIS STUDY

Underlying both the legal and ethical questions raised by the use of such "disclaimers" in SPDs are a host of empirical questions concerning how readers understand and interpret these controversial devices. For instance, what design practices (including those now required by ERISA plain language provisions) are likely to insure that ordinary readers will notice and read these disclaimers? And if readers do take note of them, how will readers construe or interpret them? What guidelines for writing

29. Id. at 1475 (emphasis added).
30. See, e.g., Tinsley v. General Motors Corp., 622 F. Supp. 1547 (N.D. Ind. 1985) (holding that a disclaimer was acceptable where the text of the SPD was identical to the text of the plan, thereby not misleading the employee); see also S. Bruce, supra note 7, at 397.
31. 758 F.2d 1566, 1570 (11th Cir. 1985).
these disclaimers are appropriate as demonstrated by experimental research? Or, does research show that disclaimers are inherently confusing to most readers and therefore ought to be strictly prohibited?

The purpose of the present study is to report the results of two similar experiments, each attempting to find out what readers are likely to understand about the information contained in an actual medical insurance SPD. In particular, the experiments focus on readers' perception and understanding of a contract disclaimer used near the end of an SPD.

Questions concerning the adequacy of this SPD and disclaimer first arose in a Ninth Circuit Court of Appeals case, Bower v. Bunker Hill Co. The underlying legal dispute in the case was whether Bunker Hill Company had violated its contract with its employees, most of whom were retired members of United Steelworkers of America ("USW"). Following a shutdown in 1982, the company informed employees that medical insurance benefits would no longer be paid. USW attorneys representing retirees claimed that these insurance benefits were vested for the retirees and the company could not cancel them. The benefits, in the union's view, were to endure throughout retirement for eligible employees. But since these benefits were nowhere limited and were only briefly described in the official collective bargaining agreement worked out between USW and Bunker Hill, the court examined "extrinsic" sources of evidence to determine the true intent of the parties regarding these benefits.

The extrinsic sources of evidence included oral representations by management, the provision of the disputed benefits during a 1977 strike, and the SPD itself. In making its appeal, Bunker Hill maintained that it had explicitly reserved the right to cancel in its separate, comprehensive insurance contract, apart from the SPD it distributed to its employees. Bunker Hill pointed out that their SPD contained a disclaimer explicitly informing the employee that the SPD was "not a contract." In addition, the disclaimer told the employee where a copy of the actual contract could be obtained. The disclaimer involved read as follows:

Note: This is an illustration of benefits—not a contract. For details of all benefits, limitations and exclusions, you may see a copy of the contract at the personnel office of the Bunker Hill Company in Kellogg.

In reviewing Bunker Hill's argument, the court asked if this disclaimer "adequately" informed the employee that the insurance plan was subject to contractual terms not mentioned in the SPD. The court raised this question in part because the contract disclaimer was printed in smaller typeface than the surrounding text. The court pointed out that

32. 725 F.2d 1221 (8th Cir. 1984).
33. Id. at 1223-24.
34. Id. at 1224.
such a design practice violated specific provisions in ERISA.\textsuperscript{35} Moreover, the court, without directly quoting the SPD, inquired about the suggestive language in its very first paragraph, which states:

Employees receiving a pension from the Bunker Hill Company are eligible for the benefits outlined in this booklet. Your spouse and children, at the time of your retirement, are also eligible. In the event of your death, your children and surviving spouse who has not remarried, may continue to be covered.

The court expressed concern about how employees might respond to such language. For instance, the court noted that if employees did not notice or understand the implications of the contract disclaimer, which was placed near the end of the SPD, they might naturally construe the earlier language to mean that their coverage under the plan was lifelong and irrevocable for those retirees who met the eligibility conditions that the SPD set forth.\textsuperscript{36} Given this suggestive initial language and the possibility of not seeing or else not understanding the disclaimer, the court asked if retirees would simply assume the SPD was a statement of their contract. The court did not pass judgment on whether the disclaimer was adequate in the sense of being both noticeable and understandable. Instead, it concluded that such “adequacy” constituted a “factual dispute” requiring further testimony.\textsuperscript{37}

The court remarked as follows:

Since the pension is lifelong, employees may have viewed the related insurance also to be a lifelong benefit. Moreover, the summary description assures pensioners that, upon their death, their “children and surviving spouse may continue to be covered.” Such language suggests that retirement insurance benefits may not have been limited to the duration of the collective bargaining agreements.\textsuperscript{38}

On remand, this issue along with the other factual issues mentioned above went to jury trial.\textsuperscript{39} The trial judge disallowed any expert testimony regarding the adequacy of the disclaimer, noting that “the jury [could] assess that adequacy with no help at all.”\textsuperscript{40} Bunker Hill lost the case and relief was ordered. Though the verdict depended heavily upon the evidence of management misrepresentations, the court noted in its denial of post-trial motions that the “jury would have been justified in finding that the disclaimer was insufficient...”\textsuperscript{41}

In spite of this holding, we chose to test the disclaimer in \textit{Bower v.}
Bunker Hill because of its apparent explicitness. We felt that it would make an excellent initial empirical test for the proposition that any kind of disclaimer, in the context of an SPD, is likely to confuse readers and/or lull them into believing further inquiry is not necessary.

III
TESTABLE ASSUMPTIONS ABOUT CONTRACT DISCLAIMERS

As noted above, the Bunker Hill Company maintained that its insurance benefits—indeed, the entire plan—were not vested and could be cancelled at the company’s discretion. According to the company, the plan’s premium benefits were neither lifetime benefits nor irrevocable. Company representatives correctly asserted that the company’s right to cancel the plan was stated in the complete contract to which the employees may have had access at any time. The company pointed out that the fine-print disclaimer in the SPD mentioned the real contract, and it further argued that the SPD, because it directed readers to the real contract, constituted an adequate disclosure of the employees’ rights. In other words, the company felt the disclaimer adequately notified the retiree, albeit indirectly, that the plan was not necessarily lifelong or irrevocable. However, an important testable assumption of the company view is that most readers of the brochure readily notice and understand the disclaimer. This Article evaluates this assumption.

It is necessary first to look carefully at the implications of the company’s position. If the company’s assumption about the visibility of the disclaimer is correct and the disclaimer “adequately” serves its function, the reader should easily infer that the comprehensive contract may qualify, or even revoke, any benefits or terms set forth in the SPD. In other words, the disclaimer is “adequate” if it is both intelligible to the reader and noticeable. The company’s assumption means that retirees who, for example, are trying to clarify the length of insurance-premium coverage offered under the plan, will initially be guided by the first paragraph in the brochure, and may infer that their premiums are paid for lifetime coverage and that benefits cannot be revoked. However, they will then read the fine-print “disclaimer” contained near the end of the brochure and, properly understanding its significance, will at that point infer that their benefits are not necessarily lifelong at all. At least, this is the way the company argues that ordinary readers will think and behave. The company asserts that the disclaimer is noticeable enough and its meaning clear enough to insure that readers will not rely exclusively upon language in the brochure to find out exactly how long the plan lasts.

But is the disclaimer, as presented, as noticeable and intelligible as

42. See supra p. 359.
43. See supra p. 360.
Bunker Hill claimed? Expert opinions on this issue might differ. Therefore, some empirical evidence will be helpful in determining whether or not the disclaimer is sufficiently noticeable and clear to communicate the plan's provisions, as required by ERISA.

A. Experimental Methods and Goals

Protocol methodology is ideally suited to test questions about readers' inferences. Simply defined, a protocol in psychological research is a tape-recording of a person thinking aloud while performing some task. For instance, the task might be playing chess, reading a technical manual while trying to solve a problem, or answering a questionnaire. The person's "in-process" comments are later transcribed for analysis.

Protocols differ from the classical psychologist's use of "introspection." When engaging in introspection, persons are asked to describe their thoughts or to describe their thinking processes. When giving a protocol, however, people are asked "to say aloud whatever they are thinking." Thus, in making a protocol of people responding to a questionnaire, people read the question aloud and interrupt themselves, whenever they choose to make a comment or express what they are thinking.44

Protocols help show the course of an individual's focus of attention while working at a particular task. Pioneered largely at Carnegie Mellon University, protocol methodology has been used extensively by cognitive researchers to investigate the difficulties that readers experience in comprehending technical and functional texts, including legal texts.45

In the two experiments we report below, we used a form of protocol methodology. Although considerations of length and focus do not allow us to fully explain our approach here, the following provides a general account of our methods.

We designed our experiments to answer three questions:

1. How likely is it that the Bunker Hill disclaimer will be noticed and read by readers, given that it is printed in smaller typeface than the surrounding text and placed near the end of the brochure?

2. If, in the course of reading, the disclaimer is not noticed and read by the reader, what is the reader likely to believe about his

44. Space limitations prevent a fuller explanation of the varieties of protocols here. A comprehensive history and evaluation of this methodology is given in K. ERICSSON & H. SIMON, PROTOCOL ANALYSIS: VERBAL REPORTS AS DATA (1984).

rights, benefits and length of coverage under the *Bunker Hill* plan?

3. If, in the course of reading, the disclaimer *is* noticed *and* read by the reader, what is the reader likely to believe about his rights, benefits, and length of coverage under the *Bunker Hill* plan?

Generally speaking, to determine the adequacy of both the disclaimer and the brochure as a whole, we needed to investigate what readers would infer while trying to "use" the brochure. In particular, we needed to induce our experimental readers to look for the disclaimer with *at least* the same degree of effort that they might make if they were actual recipients of the insurance plan. Thus, both of our experiments were designed to induce subjects to read and consider information in the brochure *more carefully* than we would expect the Bunker Hill employee to read it.

Our focus was on both the visibility and intelligibility of the disclaimer. For each experiment we designed a separate questionnaire and presented it to subjects on cards. As discussed below, the two questionnaires differed slightly, but the questions in each were randomly ordered for each subject.\footnote{46. The questionnaire for each experiment may be found *infra* Appendix 1, pp. 376-77.} In both experiments, subjects were asked to read the brochure silently, taking as much time as they needed. They were allowed to re-read material as often as they wished. When subjects indicated they were finished reading, they were asked to read the questions aloud, and to "think aloud" continuously as they answered them. Subjects were allowed as much time as they wanted for this portion of the task; they were completely free to search the brochure for information. No memorization was required. Twenty-seven subjects participated in the first experiment and twenty-eight subjects in the second.

We designed the questions the subjects were asked with two purposes in mind: (1) We wanted to give readers ample motivation and reasonable opportunity to notice the disclaimer, without explicitly requiring them to do so; and (2) we wanted to find out what readers believed about their coverage under the plan. In particular, we wished to discover under what conditions if any they believed the entire plan could be cancelled. None of the questions directly mentioned the disclaimer or its presence. However, complete, accurate answers to the questions could not be given unless the reader consulted the comprehensive "contract" mentioned by the disclaimer. Thus, our basic hypothesis was that if the fine-print disclaimer was properly serving its function of referring the reader to the comprehensive "contract," we would expect readers to voice a need or request to see the contract before fully answering our questions. If the disclaimer was noticeable and its meaning clear, we ex-
pected subjects to at least mention it at some point in the course of questioning.

For example, Question 1 asked the reader about "circumstances" under which the plan could be cancelled.\textsuperscript{47} We expected a subject, when reading Question 1, to look in the brochure for any information about "circumstances" under which the plan could be cancelled. Not finding these "circumstances" discussed, we expected the subject to heed the disclaimer, and verbally indicate that the question might be answered by looking in the official contract. Similarly, to be answered properly, several other questions also required the reader to heed the disclaimer and to refer to the contract it mentioned. Thus, if the disclaimer performed its function, readers would qualify their judgments about the "accuracy" of the plan description by remarking that the brochure was not itself the actual plan.

To reiterate, the point of this question technique was to provide subjects with ample opportunity to notice, read and think about the disclaimer, and to give them incentive to use or process the information it contained, without overtly calling their attention to its presence.

**B. Results**

1. **Experiment 1**

The results of this experiment were quite surprising. Analysis of the questionnaire transcripts showed that 85.2\% of the subjects (23 out of 27) gave no indication whatsoever that they noticed the disclaimer. The experimenter's observations of subjects' attention during reading, while imperfect, further support the transcript evidence. Although it would probably take computer-aided eye-fixation equipment to rule out the possibility that these subjects did not actually see the disclaimer, the fact that they did not make any comments concerning it throughout certainly suggests that if they did see it, they attributed little or no significance to it.\textsuperscript{48} The results fail to support Bunker Hill's contentions that the disclaimer is "adequate" for an ordinary reader.\textsuperscript{49} However, given the large-scale failure of our experimental subjects to mention and apparently even to notice the disclaimer, we decided to conduct a second experiment with a slightly altered questionnaire. We wanted to assess how representative the first results were.

To make this assessment, we assumed that the 14.8\% of subjects in Experiment 1 who noticed the disclaimer represented no more than a mean value in a normal distribution. On this assumption, if we had

\textsuperscript{47} See infra p. 368.
\textsuperscript{48} See infra pp. 366-71 (questions 3 & 5-8).
tested 100 different groups of readers, 14.8% of the subjects in two-thirds or 67 of these groups would notice the disclaimer. Accordingly, about 16 groups of the remaining 33 would produce scores somewhere below 14.8%, and about 16 more would produce scores somewhere above 14.8%. This assumption enabled us to make testable predictions about Experiment 2. If 14.8% is indeed a mean value and representative, and if our first results were not anomalous, then there would be only about a 1% chance that more than half of the readers in the second experiment would notice the disclaimer.  

2. Experiment 2

Results of this experiment provide powerful confirmation of our first prediction. In fact, in this experimental group, only 3.6% (1 out of 28) made any comments indicating that they had read or “processed” the disclaimer. The remainder (96.4%) gave no indication whatsoever that they noted the disclaimer.

Some observers might argue that the intended, ordinary readers of this brochure, the employees of Bunker Hill, would have both greater motivation and greater opportunity to notice the disclaimer than these experimental subjects. That is, given that these experimental readers were not economically interested in the insurance plan, one might expect them to attend to its details with less care than the actual plan participants would.

This argument does not stand up, however, given the format of our experiments. It is unlikely that ordinary readers of the brochure would have greater motivation and opportunity to notice the disclaimer than our experimental subjects, who were instructed to carefully answer questions about the length of coverage and cancellation. Ordinary readers of an insurance brochure are not normally directed to answer specific questions about the brochure's contents or meaning. Nor are ordinary readers encouraged to carefully search through such texts to obtain their answers, as were our subjects. Thus, these experiments provide incentive and opportunity comparable to that in the ordinary employee's situation.

The major conclusion we have drawn from the above two experiments is that the disclaimer did not perform its putative function of warning careful readers that information pertinent to their questions about coverage may be found in the official “contract.” If it had, surely more than 9.2% of the subjects on average would have mentioned the disclaimer or its contents in response to questioning. Thus, the fine-print

50. Of course, as already discussed, standards for disclaimers under ERISA are at present only subjective, and thus we cannot say what percentage of notification would or would not satisfy ERISA. Surely it is arguable that the intention of ERISA is that more than 14.8% of an unbiased sample of readers notice and consider the disclaimer. As a method of disclosure, would courts find a disclaimer that generates such results acceptable?
disclaimer is probably "inadequate" under even the most liberal interpretation of ERISA; it does not serve its intended function because it simply does not get the reader's attention. Given this failure, we now turn to an assessment of what readers are likely to believe about their rights.

3. Readers' Beliefs About their Contractual Rights

We wanted to find out what readers believed about the legal status of the brochure, and what they believed about their coverage under the insurance plan. In particular, we wanted to know: (1) whether they believed the plan covered them "lifetime," so long as they fulfilled eligibility requirements; or, alternatively, (2) whether they believed the company could cancel the plan.

None of the response ratios to the individual questions is statistically significant. Therefore, no firm conclusions should be drawn from them. Nevertheless, we can obtain interesting insights into readers' beliefs about their contractual rights by carefully analyzing answers they gave.

Overall, many subjects' answers suggest that unless given more specific notice that the company does not guarantee lifetime coverage, they are likely to believe the benefit plan covers them "lifetime." As illustrated below, some readers appeared to base their "lifetime" belief on the suggestive language ("In the event of your death") presented at the beginning of the brochure. Study of the responses also indicates that, having failed to notice the disclaimer, many readers believed that the company had no right to cancel the plan. Subjects' responses to Questions 1, 3, 5 and 7 discussed below support this conclusion. We shall examine responses to Question 3 first, however, since this question most directly probed readers' understanding of the length of coverage.

a. Question 3

Question 3 asked readers to indicate the duration of their rights under the medical plan. In Experiment 1, 89% (24 out of 27 subjects) stated in response to this question that they believed the plan covered them "lifetime." In Experiment 2, 75% (21 out of 28) indicated that the company was obligated to cover them "lifetime." Thus, of the 10 subjects out of a total of 55 who gave answers other than "lifetime," none mentioned the disclaimer, the "contract," or the possibility that the company might close, as reasons for the plan not covering them for their lifetime. From such a strong response trend, it is possible to conclude

51. To make this prediction, the standard error (SE) of the estimator, $p = \frac{14.8\%}{0.0683}$, was calculated.
52. The Article discusses possible caveats to this tentative conclusion infra pp. 371-73.
53. For the actual questions used, see infra pp. 376 (Experiment 1) & 377 (Experiment 2).
that most ordinary readers of this brochure would believe the company is obligated to provide "lifetime" coverage.

Such a conclusion is not necessarily the right one, however; it must be qualified by reference to the response trend to other questions in the set. In particular, a conclusion must take into account the responses to Questions 1, 5 and 7. Some readers, for example, having stated in response to Question 3 that the plan covered them "lifetime," mentioned elsewhere certain "conditions" or "circumstances" under which they might lose their benefits. In other words, some readers appeared to demonstrate an inconsistent understanding of the status of the plan benefits. To take into account these inconsistencies, we determined what percentage of the "lifetime" responses were wholly unqualified and what percentage were apparently qualified by answers to other questions. The results for the 45 readers who answered "lifetime" for Question 3 are as follows:

- Answered "lifetime" without qualification: 44% (20)
- Answered "lifetime" with apparent qualification expressed in response to Questions 1, 5 or 7: 49% (22)
- Answered "lifetime" but elsewhere requested to see the actual "contract" mentioned in disclaimer: 7% (3)

These results bring up two points. First, not all of those who appeared to qualify their "lifetime" responses did so with the same amount of conviction, nor did they qualify their answers for the same reasons. As we will illustrate below, many of their stated reasons have nothing to do with the company's right to cancel or with the possibility of a plant shutdown. Second, even if we take these results at face value, without reference to the specific qualifications offered, it is clear that the ordinary brochure reader will misconceive the nature of the benefits to which they are entitled. After all, the ordinary reader, unlike our subjects, will not have the benefit of being repeatedly prompted by a questionnaire to think about "conditions" or "circumstances" under which the plan might be cancelled. Moreover, as we noted, a number of readers' comments suggested that they based their "lifetime" conclusion on the language used in the beginning of the brochure. Recall the opening paragraph:

In the event of your death, your children and surviving spouse who has not remarried, may continue to be covered.

The transcript evidence indicates that of 45 responders to Question 3 at least 7 (16%) interpreted this language to mean that the company
guaranteed them "lifetime" coverage. Here are their answers to Question 3:

1. I would assume it covers you as long as you're alive, or until you've used up the monetary benefits. The actual timeframe would be lifetime.
2. Lifetime, until I die—my spouse will carry it on even after I die and my children on up to 19 years of age.
3. I believe it covers me lifetime and my survivors.
4. For the employee it would be lifetime, until he dies, and then the wife would be covered until she marries, and then in some conditions the children would still be entitled.
5. Except for children, I would understand lifetime.
6. Lifetime, according to what I read.
7. My feeling is covered for lifetime unless you die.

Clearly, these results do not support the company's contention that readers will heed the disclaimer and, therefore, will not be misled by language in the brochure. As we have seen, nearly half (44%) of the readers who said they were covered "lifetime" expressed no qualifications at all. Thus, many more than the 16% whose comments we listed above may have inferred "lifetime" coverage on the basis of the initial language.

To turn to our second question—what readers believed about the company's right to cancel—it is necessary now to consider how readers responded to Question 1, 5 and 7.

b. Questions 1 and 5

Questions 1 and 5 asked the reader whether there were any conditions or circumstances under which the company could cancel the medical benefits. More specifically, Question 1 asked if there were any "circumstances" under which Bunker Hill might cancel, and Question 5 asked if there were any "conditions" under which Bunker Hill might "cancel or take away" the plan.

The responses for both experiments may be summarized as follows:

1) Responses Not Favorable to Company Position

Thirty-five out of 55 (63.5%) stated either (1) that the company could not cancel the plan, or (2) that they could not think of or find any "conditions" for cancellation except those stated in the brochure. Typically, the latter subjects searched unsuccessfully under the section

54. The version of Question 3 used in Experiment 1 differed slightly from that used in Experiment 2. See supra note 53.
55. For an explanation of how responses to these questions were scored, see infra Appendix 2, pp. 378-80.
56. For the actual text of the questions, see infra pp. 376 (Experiment 1) & 377 (Experiment 2).
marked "Exclusions" to find information about complete cancellation. None of these subjects indicated that they would like further information or that they would request any. Further, none of these subjects made any remarks about plant closings or shutdowns, and none gave evidence indicating that they saw the disclaimer.

Eleven out of 55 (19.7%) stated either (1) that they didn't know whether or not the company could cancel, or (2) that they could not make any assumptions about cancellation without getting more information. However, none of these subjects mentioned that they would like to see the contract alluded to in the disclaimer, nor did any subjects mention visiting the "personnel office" to see the official contract. Thus, these results also fail to support the company's contention that its disclosure was "adequate" under present ERISA rules.

2) Responses Favorable to Company Position

Four out of 55 (7.5%) stated that they could not determine whether or not the company could cancel unless they could see the "real" contract alluded to in the fine-print disclaimer. These were the same subjects who indicated that they had seen the disclaimer.

Five out of 55 (9%) stated that the company could cancel the plan and offered as one possible reason the fact that the company might close or shut down. We suspect, however, that 4 of these 5 may have considered a shutdown only because they were "prompted" to do so by answering Question 7 before Questions 1 or 5. None made any reference to the fine-print disclaimer.

While not as dramatic as the response rate for Question 3, the combined results offer support for our interpretation of the Question 3 results. Given the pattern of responses to Questions 1 and 5, our view is that many ordinary readers of the brochure are likely to believe the plan covers them "lifetime." As we have seen above, only 9 out of 55 (about 17%) responded in a manner that the company might predict. Again, these results suggest that having failed to detect the disclaimer, most readers find no explicit basis available upon which to assume that the company may cancel the plan.

c. Question 7

Question 7 prompted readers to consider what would happen to their insurance benefits under the plan if the company closed its operations. Two substantially different versions of this question were used in Experiments 1 and 2.58

As careful scrutiny of the brochure indicates, there is virtually no

57. For an explanation of how responses to this question were scored, see infra pp. 378-80.
58. See infra pp. 377.
information within the brochure to help the reader answer either version of Question 7. The brochure makes no mention of shutdowns or closings or other conditions for complete cancellation, such as the company’s financial inability to pay. The absence of such information is significant because readers are likely either: (1) to rely upon what other information in the brochure they tacitly construe as relevant to the question (for instance, the “event of your death” language cited at the beginning of the brochure); or (2) to draw inferences about the plan based on their own prior experience and speculations. For instance, some readers might recall a newspaper account of another plant closing in which workers lost their benefits. Because the readers did not pay close attention to this account, they might simply infer that anytime a plant closes, workers automatically lose their benefits.

We obtained different results for each version. The results for the version used in Experiment 1 appear on the surface to support the company’s contention (that readers will believe the company is not liable for the plan in the event of a plant closing. However, a careful analysis of the responses reveals that most readers did not know what the company’s obligations were with respect to the plan in such an event. Not surprisingly, 70% of the subjects responding to the first version stated explicitly that they could find no information about cancellation or company closings. The results for the second version in Experiment 2 suggest that only a few readers (11%) believed that the company was not liable for the insurance premiums; 89% either did not know whether the company was liable, or else concluded definitely that the company was liable. The specific results for Experiment 2 are as follows:

1) Responses Unfavorable to the Company’s View

Eleven out of 28 (39%) stated explicitly that they believed the company was obligated to continue the plan if, despite the shutdown, financial resources for supporting the plan were still available. None of these readers commented on the company’s contractual obligation in the event that the company had no resources left to continue the plan. For example, one reader stated: “As best I recollect, there’s nothing in the booklet. If they had money, yes, I would say they would pay me.” Another stated: “They would have to pay up until I quit paying premiums.”

Twelve out of 28 (43%) provided comments indicating they did not know what to believe about the company’s obligation. These readers did not provide any comments as to what made them uncertain, except that they could not find any mention of shutdowns in the brochure. One reader glibly stated: “Not mentioned. Call a lawyer.” None mentioned the fine-print disclaimer or the “contract” in the personnel office. Thus,

59. For details of readers’ responses, see infra pp. 379-80.
these responses do not support the company's contention that its disclosure was "adequate" under ERISA rules.

Two out of 28 (7%) stated that most likely some government agency or other source would continue to pay their insurance premiums (in lieu of the closed company), but made no comment regarding whether they felt the company was contractually obligated to pay. For instance, one reader surmised: "I would say that since it has government backing that employees would still get benefits, even if the company went out of business."

2) Responses Favorable to the Company

Three out of 28 (11%) stated that the company was not obligated to continue to pay for the premiums, even if the company had the resources to do so.

IV
SOME CAVEATS AND CONCLUSIONS

It is important to emphasize that the basic purpose of these experiments was to find out what readers believe about their contractual rights under the plan if given the Bunker Hill SPD as it currently exists with no other information. We have presented strong evidence that readers do not even see the fine-print disclaimer, which the company contends provides adequate notice, albeit indirectly, of the company's rights and obligations. A disclaimer so frequently overlooked under favorable conditions can hardly be deemed "adequate." Readers' difficulties thus seem to justify completely the ERISA regulation prohibiting the use of fine print when explaining "exceptions, limitations, reductions or restrictions" of plan benefits.60 The location of the disclaimer near the end of the brochure may also have contributed to readers' failure to notice it, despite our questioning.

Moreover, given the "invisibility" of the disclaimer, the specific responses to Questions 1, 3, 5 and 7 in our experiments further suggest that readers are likely to construe the plan as covering them "lifetime." This conclusion is not contradicted by our analysis of responses to either version of Question 7. As we saw, some readers apparently drew a "lifetime" inference based upon the initial language of the brochure, which states what happens to benefits in the event of the retiree's death. Our results also suggest that most readers believe the company must continue the plan—except when the retiree fails to meet the eligibility requirements explicitly stated in the brochure.

We must emphasize, however, that confirmatory research on the

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60. 29 C.F.R. § 2520.102-2(b) (1987).
dangers presented by disclaimers is necessary. In particular, other researchers may want to use a control group to investigate readers' understanding of an SPD that contains an explicit right of cancellation statement. For instance, for one group of readers a statement might be added like the following to the brochure: "The Bunker Hill Company reserves the right to cancel your insurance premium benefit at any time." It is possible that, had we included such a statement somewhere in the present document, readers may have failed to notice it or, having seen it, misunderstood its meaning. Thus, we do not know for certain whether including such a statement would make readers any less likely to conclude, as many did here, that their benefits are lifetime. Of course, precisely where in the SPD such a disclaimer is placed could have a significant impact on whether it is noticed. Its precise wording is also a potentially significant variable.

There are other variations on our study that could usefully follow up on our findings about readers' beliefs. For instance, in addition to testing readers' responses to a document containing an explicit right of cancellation provision, it would be helpful to test readers' understanding of a document in which the suggestive initial language, "In the event of your death," is removed. Would readers of the Bunker Hill document, absent this suggestive language, be as likely to conclude their coverage was lifetime as apparently they were here? Another study might try to determine whether placing the same disclaimer in a different position, possibly nearer the beginning of the brochure, might increase the likelihood that readers will notice it.

With these caveats in mind, we nevertheless conclude that the overall pattern of readers' responses indicates that the average person would neither notice nor appreciate the contract disclaimer as it appeared in the Bunker Hill SPD. Such an SPD may violate ERISA provisions and regulations in several ways:

1. The brochure neglects to state the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits."\(^{61}\) Nowhere does the brochure tell the employee that the company reserves the right to cancel the plan.

2. By using fine print and apparently poor positioning, the disclaimer obscures a key "limitation" that the company claims to be in effect, \(i.e.,\) the right to cancel the plan at the company's discretion.\(^{62}\)

3. As a result of the failure of the disclaimer to serve its intended purpose, we also conclude that the brochure is not designed "in a manner calculated to be understood by the average plan |

\(^{61}\) Id. § 2520.102-3(k)(1).

\(^{62}\) Id. § 2520.102-2(b).
4. The brochure is not "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." As our results indicate, because readers do not notice the fine-print disclaimer, they must use, willy-nilly, whatever other language is in the SPD as a guide in making judgments about their rights and obligations. That they can be misled by the other language is clear.\(^\text{64}\)

\textit{Can the Brochure be Improved?}

Finding specific faults with the present document does not automatically tell us how to improve it. Many alternative versions, varying in their efficacy, may exist. Moreover, "user-testing" a document like this brochure can be an expensive process. But even a simple "grammar-school" analysis of the wording of the disclaimer, without attending to problems in the rest of the brochure, does suggest several improvements that can easily be made.

Apart from the apparently poor location of the disclaimer and its smaller typeface, the most serious and most likely source of confusion is the use of the term "contract." In context, readers may not know what particular "contract" is meant: Is it the contract between Bunker Hill Company and its employees, \textit{i.e.}, the collective bargaining agreement, or the contract between Bunker Hill and ABC Insurance? During informal debriefing of subjects after the disclaimer was pointed out to them, some subjects spontaneously remarked that the disclaimer referred to the "labor contract" or "bargaining agreement." Others stated that the contract was between ABC Insurance and Bunker Hill Company. Still others appeared confused or didn't know. In addition, during experimental questioning three subjects stated flatly that the brochure itself was a contract, obvious evidence that they did not heed the disclaimer. These observations indicate that more precise experimentation is needed to determine exactly what readers infer about the meaning of the term "contract" in the disclaimer.

A second likely source of confusion in the Bunker Hill disclaimer is the term "illustration." In context, the nonlegally trained reader may not know what this term implies when used to describe an SPD. Unfortunately, the term lies at the heart of the whole controversy over the contractual status of SPDs. For instance, it is unclear whether an "illustration" of a contract may contain inaccuracies, or merely be incomplete, or both. Readers are not likely to know what to infer from such a term. In particular, they may not know to what extent this term qualifies the

\(^{63}\) \textit{Id.} § 2520.102-2(a).

\(^{64}\) \textit{Id.}
accuracy of the information presented in the brochure. Thus, along with the meaning of the term “contract,” the meaning of the term “illustration” also merits analysis through formal experimentation.

A third possible source of confusion is the vague use of the pronoun “this” at the very beginning of the disclaimer in the sentence “This is an illustration of benefits—not a contract.” In context, it is not clear what the pronoun “this” refers to: Does it refer to the entire brochure, or to only the section immediately preceding the disclaimer? Unhappily, the scope or breadth of reference indicated by the word “this” cannot be readily verified by the reader. To be more clear, a noun referent following “this” should be provided, such as “this document” or “this section.”

Thus, not only did the creators of the brochure choose an inadequate typeface and a poor location for the disclaimer, they also chose language that is unclear and ambiguous. From a professional document-designer’s point of view, problems with the disclaimer terminology are easily avoidable. Improvements come readily simply by observing basic semantic and grammatical principles. Of course, our linguistic observations do not necessarily prove all readers will be confused about the meaning of the disclaimer—if they in fact see it and read it. These observations nevertheless suggest that without the company providing additional interpretation, readers will be unable to fully understand the disclaimer. More research could better define the linguistic problems described above and quite possibly identify others.

There is more than sufficient experimental literature to support the belief that a different design would make the present disclaimer much more noticeable. A variety of studies in functional document design have shown that crucial information such as a disclaimer is much more noticeable when it is placed closer to the beginning of the printed matter and the size of typeface is increased. Indeed, the wealth of research on the effect of various display techniques on the accessibility of information in texts is one basis for the ERISA regulations cited in the beginning of this report.

**Should ERISA Include a “No-Disclaimer” Regulation?**

As noted, ERISA does not specifically prohibit the use of contract disclaimers in SPDs. While we are not yet ready to recommend that

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65. Important recent research on readers’ perception of vague pronouns can be found in Geisler, Kaufer & Steinberg, *The Unattended Anaphoric ‘this’: When Should Writers Use It?*, 2 **WRITTEN COMM.** 129 (1985).


67. See, e.g., **AMERICAN INSTITUTES FOR RESEARCH, GUIDELINES FOR DOCUMENT DESIGNERS** (1981); in particular, see id. at Chapter II-C, “Typographic Principles”).
ERISA include such a prohibition on the basis of these two experiments alone, we think the idea merits more serious consideration than it has so far been given. There is a clear reason why we have reached this conclusion. As the court implied in Zittrouer v. Uarco Inc. Group Benefit Plan, allowing any use of disclaimers, even when they are fully explicit, properly printed and formatted, contradicts the principle of disclosure underlying ERISA. Disclaimers should not be used either to avoid or to distort legislatively required information. As currently drafted, SPDs include many details about coverage, including types of services, percentage of deductible costs, and so on. Upon seeing these things, nonlegally trained readers may assume that an SPD states contractual terms; they assume they are reading an “official” disclosure. From the outset, many readers may thus not expect to see disclaimers in plan summaries, or, if they do expect to see them, they may nevertheless be led to misconstrue or discount them through the kind of evasive linguistic devices we have discussed.

As a final argument against the use of disclaimers, consider again the potential vagueness of the term “illustration” as used in the Bunker Hill disclaimer. Readers who are alert enough to spot the disclaimer and who have some comprehension as to what it means may nonetheless be left in doubt as to whether anything in the SPD is true. Furthermore, the burden of them finding out what is true is thrust back onto them and leaves them at a disadvantage. For now, apparently, employees must compare the SPD with the “official” plan for glitches and differences—hardly the kind of outcome that one would desire from legislation intended to simplify the disclosure process. As a result, two documents become mine-fields for the employee. The technicalities of deductibles and the extent of coverage offered by SPDs are difficult enough to understand without introducing a kind of linguistic matching game into the situation. The point of ERISA was to eliminate unfair practices and to enforce a more particularized form of reporting. Clearly, the use of contract disclaimers works directly against particularized reporting since contract disclaimers almost invariably function to screen details from the view of the reader and make them harder to confirm. Thus, at best, contract disclaimers seem to make the reader’s task more, rather than less, complicated. At worst, they directly subvert the notion of fair disclosure and violate the law.

The larger problem remains, of course, as to how SPDs can be written without disclaimers in language comprehensible to ordinary readers so as to provide full and accurate representations. We have hinted at many issues for document design researchers to investigate. For in-

69. See supra text accompanying note 3.
stance, it is important to discover what formats, styles and word choices might bring about improvements in reader comprehension. It is also necessary to pinpoint what introductory material or "previews" would best prepare the reader for the content and structure of the document, and help him or her to answer questions about the information it contains. Solutions to such problems are not easy to find, nor does experimental or applied research of this kind come cheap. But "expert" answers to such questions, often offered as courtroom testimony, are plainly insufficient. To determine the "adequacy" of plan documents for purposes of fair disclosure, more is needed than quotation from the latest style book or academic pariah. We hope that the present report demonstrates the importance of taking an experimental approach to these difficult issues in the future.

APPENDIX 1

TASK DIRECTIONS AND LIST OF QUESTIONS USED

Experiment 1

Directions. First read the brochure carefully. Then assume you are receiving a pension from the Bunker Hill Company, and read and answer the questions (printed on cards) out-loud. Say everything you are thinking as you answer, and I will tape-record your comments. Take as much time as you need. You may re-read or refer to the brochure as often as you like or feel necessary. Take your time and do not hurry.

1. According to the booklet, under what circumstances can the company cancel all of the medical benefits it describes? If you cannot find an answer to this question, or feel uncertain, explain what you would assume about cancellation of this plan if you were an employee of Bunker Hill.

2. What conditions must you meet in order to receive health benefits from Bunker Hill?

3. According to your understanding of information in the booklet, for how long do you believe the medical benefit plan covers you? Indicate the length of time below.
   - less than one year
   - more than one year
   - more than three years
   - lifetime (until I die)
   - other

4. According to the booklet, what happens to your medical plan benefits if you die?

5. From your understanding of the booklet, are there any conditions under which Bunker Hill may cancel or take away the entire medical insurance plan given to you here? If you believe there are such conditions, explain what they are. If you don't believe there are such condi-
tions, or if you cannot find them stated, explain what you would assume about cancellation if you were an employee of Bunker Hill.

6. Do you believe that this booklet accurately describes the benefits you are entitled to receive, as a pensioner, from Bunker Hill?

7. According to your understanding of information in the booklet, if Bunker Hill Company decided to go out of business or was forced to close its operations, would you still receive the medical insurance benefits as part of your pension? If you cannot find the answer to this question, or feel uncertain, explain what you would assume would happen to this health benefit plan if the company went out of business or closed.

8. Do you believe that this booklet accurately describes conditions under which you, as a pensioner, are entitled to receive medical insurance from Bunker Hill?

9. Now that you have read the booklet, explain what you are eligible to receive?

Questions Changed in Experiment 2*

1. Assume you are a retiree who fully meets the eligibility requirements for this insurance. According to the booklet, under what circumstances can the company cancel all of the medical benefits it describes? If you cannot find an answer to this question, or feel uncertain, explain what you would assume about cancellation of this plan if you were an employee of Bunker Hill.

3. Assume you are a retiree who fully meets the eligibility requirements for this insurance. According to your understanding of information in the booklet, for how long do you believe the insurance plan is obligated to cover you (as a retiree)? Indicate the length of time below:
   —less than one year
   —more than one year
   —more than three years
   —lifetime

5. Assume you are a retiree who fully meets the eligibility requirements for this insurance. From your understanding of the booklet are there any conditions under which Bunker Hill may cancel or take away the entire medical insurance plan given to you here? If you believe there are such conditions, explain what they are. If you don't believe there are such conditions, or if you cannot find them stated, explain what you would assume about cancellation if you were an employee of Bunker Hill Company.

7. Assume you fully meet the eligibility requirements for this insurance. Now suppose Bunker Hill closed its operations. If (after closing) they still had the money to support the insurance plan described here, would

* Note: The questions not listed here (2, 4, 6, 8 and 9) were exactly the same as those used in Experiment 1.
you still be entitled to receive plan benefits? As best you can, answer the question based on what information you find in the brochure.

APPENDIX 2

SCORING THE ANSWERS

Scoring for Questions 1 and 5

Because the same subject might give an answer to Question 1 that conflicted with his or her answer to Question 5, we compared the answers that each subject gave to 1 and 5. We decided to accept the answer that most directly favored the company’s contention that the brochure provides adequate notice of its rights of cancellation. For instance, if a subject in answer to Question 1 said that the company could cancel the plan, and then also said in response to Question 5 that he was unsure about whether or not the company could cancel, we scored only the subject’s response to Question 1. In this manner, the results we present reflect the most conservative estimate of the number of subjects who believe the company may not cancel the plan. Note that in Experiment 2, each of these two questions were slightly changed.

Scoring for Question 7

Because our different versions for Question 7 supplied our readers with different assumptions, we need to consider separately the responses that readers made to them. We cannot consider the data from both versions together (as we did with Questions 1 and 5) since the two versions of Question 7 are radically different. The results for the version used in Experiment 1 are considered first.

As one might predict, most subjects (70%, or 19 out of 26) stated explicitly in response to the first version that they could find no information about cancellation or company closings. Their speculations about what “would happen” to their benefits in the event of a plant closing are broken down as follows:

- 63% (17 out of 27) speculated that they would lose their benefits if the company closed or decided to go out of business.
- 22% (6 out of 27) speculated they would be able to keep their benefits. However, none of these subjects mentioned that they would be able to keep their benefits because the plan covered them lifetime.
- 15% (4 out of 27) provided comments indicating they did not know what to believe. They offered no comments as to what made them uncertain, nor did they indicate what additional information (if any) they would like to have in order to make an assumption.

It might be argued that such results taken at face value indicate that our strong results for Question 3 (above) are unreliable. The results presented here for Question 7 suggest that most subjects (63%) do not believe the plan provides lifetime coverage. These subjects seem to feel a plant closing ends their benefits. Our results for Question 3 in Experiment 1 indicated that 82% think the plan covers them lifetime. Thus, the answers given to Questions 3 and 7 appear to contradict each other.

In fact, one could argue that the combined data for Questions 3 and 7 do not allow us to establish what subjects really believe about the length of coverage
and cancellation rights of the company under the plan. For instance, do subjects believe the plan's coverage is "lifetime," even if the company closes? Or, do they believe that a plant closing would legally terminate an otherwise "lifetime" benefit? To illustrate these contradictory implications, here are the remarks of one subject in response to Question 7, on the one hand, and her later response to Question 3, on the other:

(7) There is no statement on the case of what happens if Bunker Hill Company goes out of business. I assume this health benefit plan, if the company went out of business or closed, would be the same as many as we have seen heretofore: that people would be out of luck.

versus

(3) [It's] lifetime, until you die.

In fact, however, the contradiction between the data for Question 3 and the data for Question 7 may not be as significant as it appears. There are two reasons why the apparent contradiction should be discounted.

First, Question 7 asks subjects only about what they "assume would happen." It does not ask specifically about what they believe the company is obligated to do. By checking the responses of subjects who affirmed they would "lose their benefits" in the event of a shutdown, we discovered that they had markedly different interpretations of what sort of evaluation the question was asking them to make. The results below make this diversity clear:

—Of the 17 subjects who stated they "would lose their benefits," most (70%, or 12 out of 17) did not indicate any specific reason why they thought a company closing would cause them to lose their benefits. The comments of some of these subjects suggested a pessimism concerning the workings of the legal system in protecting their rights. They made no comments to the effect that they would lose their benefits because the company was not legally obligated. For example, one pessimistic reader remarked, "I think they could (take away your benefits). What can you do about it if they close? I don't think you can do anything about it." Another said: "I don't see anything in the booklet that indicates that would happen if Bunker Hill went out of business or were forced to close its operations. I would assume I would be left out in the cold. In other words, I would have no benefits."

—12% (2 out of 17) stated that the reason they would lose their benefits is that the company would not have the money to pay for the insurance premiums. In other words, these subjects imagined a scenario in which the company was completely bankrupt, or completely without resources. They did not specifically indicate that the company was not legally obligated. For instance, one reader stated: "I assume automatically that your benefits are kaput. In other words, you know, not there. Unless they have something set aside that would protect and cover the employees that had worked for them, but it doesn't seem logical that they would, being that they were bankrupt or something."

—18% (3 out of 17) implied that they would lose their benefits because the brochure provided no explicit statement about what would happen to the plan if the company closed. That is, they appeared to assume that the absence of an explicit statement in the brochure meant that the company could not be
held liable. Two of these 3 subjects also commented that the reason they would lose their benefits was that in their experience only pension plans (and not health insurance plans) were protected by the government.

Given the underlying reasons for subjects' responses, it would be a mistake to interpret the results for Question 7 as necessarily offering a more accurate picture of reader beliefs than do the results for Question 3. On the contrary, most subjects (82%, or 14 out of 17) who "predicted" a loss of benefits provided no evidence that they were making a specific judgment about the company's contractual obligations for coverage under the plan. Most subjects vaguely speculated about what "would happen" to their benefits in a shutdown situation. The evidence further suggests that at least some subjects imagined a situation in which the company simply had no money left to pay and therefore could not be made to do so, regardless of any legal liability.

Second, perhaps more importantly, we doubt that ordinary readers of the brochure would be prompted to consider the plan in the light of a possible plant shutdown—as our experimental subjects were sometimes prompted to do by reading Question 7 before reading Questions 1 or 5. In fact, only 1 of the 27 subjects can be said to have definitely considered the possibility of a shutdown and its effect on the plan without being prompted to do so by Question 7 itself.

Thus, while at first glance the responses to Question 7 in Experiment 1 appear to contradict those for Question 3, further inspection shows that most subjects were not answering a question about the company's contractual liability. In contrast, we would argue that Questions 1, 3 and 5 more directly probe what subjects believe about their contractual rights—and the company's legal liability under the plan. The responses reviewed earlier to Questions 1, 3 and 5 suggest that most readers of the brochure believe the company is obligated to cover them lifetime; they believe that the company may not cancel the plan so long as employees meet participation criteria.

Nonetheless, given the uncertain nature of many subjects' responses to Questions 7 in Experiment 1, we decided to change the question in Experiment 2. In particular, we wished to determine what readers would infer about their rights and the company's legal obligations in the event of a company closing, provided the company still had the financial resources to support the plan. As indicated above, we substantially modified the language of Question 7.