IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JOHN M. ORLANDO,	)	
	)	
Plaintiff,	)	
	)	**No. 06 C 3758**
v.	)	
	)	**Magistrate Judge Cox**
UNITED OF OMAHA LIFE INSURANCE COMPANY, a Nebraska corporation,	)	
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS
MOTION FOR A DECLARATION OF THE STANDARD OF REVIEW

Defendant, UNITED OF OMAHA LIFE INSURANCE COMPANY ("United of Omaha"), by its attorneys, Michael J. Smith and Warren von Schleicher, hereby submits its Memorandum in Support of its Motion for a Declaration of the Standard of Review:

INTRODUCTION

The plaintiff, John Orlando ("Orlando"), seeks to recover disability benefits under an ERISA governed employee welfare benefit plan ("Plan") sponsored by his employer, West Monroe Partners, LLC ("West Monroe"). The Plan was established by terms of Group Policy GLTD-86F9 issued to West Monroe by United of Omaha. Group Policy GLTD-86F9 was issued with a Rider that states "This rider is made a part of Group Policy GLTD-86F9." The Rider further states "This rider is effective January 1, 2003," which also is the effective date of Group Policy GLTD-86F9. A copy of Group Policy GLTD-86F9 and the Rider (collectively, "Group Policy") is attached to Defendant's Appendix as Exhibit A.

The Group Policy, in its Rider, contains clear language granting discretionary authority to United of Omaha. Where, as here, the Group Policy contains clear discretionary language, the

applicable standard of judicial review is the "arbitrary and capricious" standard. Under this standard, the court essentially sits as a court of appeals and evaluates whether the administrator's benefit determination was reasonable and permissible, or arbitrary and capricious.

Orlando, however, wants the court to determine the standard of review based solely on the contents of the Certificate Booklet, because the Certificate Booklet is silent on the issue of discretion. The Certificate Booklet, in the parlance of ERISA, is the "summary plan description" that Orlando received from West Monroe, and which plan administrators must furnish to employees pursuant to 29 U.S.C. §1022(a). The Certificate Booklet is attached to Defendant's Appendix as Exhibit B.

According to Orlando, silence in the Certificate Booklet on the issue of discretionary authority trumps the clear grant of discretionary authority in the Group Policy. ERISA's regulations, however, specify the information that must be disclosed in the summary plan description, such as eligibility requirements, conditions that may result in disqualification, and conditions that may result in the denial of benefits. *See* 29 C.F.R. §2520.102-3. But ERISA does not require the summary plan description to address the issue of discretionary authority. The clear grant of discretionary authority in the Group Policy, therefore, is not nullified by silence on the issue in the Certificate Booklet. *See Mers v. Marriott Intern. Group Accidental Death and Dismemberment Plan*, 144 F.3d 1014, 1024 (7th Cir.), *cert. denied*, 525 U.S. 947 (1998) ("If silence in the SPD were enough to trump the underlying plan, then SPDs would mushroom in size and complexity until they mirrored the plans.").

The Certificate Booklet, moreover, clearly informed Orlando that his coverage was subject to the terms and conditions of the Group Policy. Even Orlando does not dispute that if he had inquired further and read the Group Policy, he would have learned that United of Omaha

retained discretionary authority. Orlando cannot nullify United of Omaha's discretionary authority, and alter the terms of his employer's ERISA Plan, simply by refusing to look for himself at the terms of the Group Policy. *See Shyman v. Unum Life Ins. Co. of America*, 427 F.3d 452, 455 (7th Cir. 2005) ("Shyman does not contend that a beneficiary who inquired (or looked for himself) would not have discovered the discretion-granting language.").

The Group Policy contains clear language granting discretionary authority to United of Omaha, consistent with Seventh Circuit authority. No more is needed to trigger the arbitrary and capricious standard of review.

ARGUMENT

I. The Group Policy Grants Discretionary Authority To United Of Omaha.

Judicial review of an ERISA fiduciary's benefit determination is *de novo* unless the terms of the plan grant discretionary authority to the administrator. When the plan confers the administrator with discretionary authority, however, courts apply the "arbitrary and capricious" standard. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). *See also Davis v. Unum Life Ins. Co.*, 444 F.3d 569, 575 (7th Cir.), *cert. denied*, 127 S.Ct. 235 (2006) ("When, as here, the terms of an employee benefit plan afford the plan administrator broad discretion to interpret the plan and determine benefit eligibility, judicial review of the administrator's decision to deny benefits is limited to the arbitrary-and-capricious standard.") (citation omitted).

In order to confer discretionary authority, the language of the plan must clearly communicate that the administrator has discretion. *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 331 (7th Cir. 2000). The Seventh Circuit, in *Herzberger*, recommended the following "safe harbor" language for inclusion in ERISA plans as sufficient to confer discretion: "Benefits under this plan will be paid only if the plan administrator decides in his discretion that the applicant is

entitled to them." *Id*. ERISA plans that contain this safe harbor language "will not be open to being characterized as entitling the applicant for benefits to plenary judicial review of a decision turning him down." *Id*. The Seventh Circuit, however, declined to make its safe harbor language obligatory ("[w]e forbear to make our 'safe harbor' language mandatory, its absence compelling the conclusion that the plan administrator has no discretion."). *Id*.

In *Diaz v. Prudential Ins. Co. of America*, 424 F.3d 635, 637-638 (7th Cir. 2005), the Seventh Circuit amplified its holding in *Herzberger*. *Diaz* acknowledges that "*Herzberger* holds that the critical question is notice: participants must be able to tell *from the plan's language* whether the plan is one that reserves discretion for the administrator." *Diaz*, 424 F.3d at 637 (emphasis added). While continuing to commend its safe harbor language as "the surest way" for an administrator "to insulate its decision to deny benefits from plenary review," the *Diaz* court emphasized that there are no "magic words" required to confer discretion. *Id*. (*quoting Herzberger*, 205 F.3d at 331). Indeed, the court acknowledged that it "could imagine an almost infinite set of verbal formulations" that would be sufficient to confer discretion. *Id*., at 638. Rather, an ERISA plan adequately confers discretion when its language conveys that the administrator "has the latitude to shape the application, interpretation, and content of the rules in each case." *Id*., at 637-638.

Recently, the Seventh Circuit, in *Williams v. Interpublic Severance Pay Plan*, No. 07-3146, -- F.3d --, 2008 WL 1869550 (7th Cir. Apr. 29, 2008), held that language in an ERISA plan that granted the administrator with authority "to interpret the Plan, make findings of fact, and ... decide any and all matters arising hereunder, including the right to remedy possible ambiguities, inconsistencies or omissions" was sufficient to confer discretionary authority. "A broader grant

of discretionary authority is hard to imagine." *Id*. The Seventh Circuit stated that "[l]anguage such as this requires deferential judicial review." *Id*. (*citing Diaz*, 424 F3d 635).

In the case *sub judice*, the Plan is the Group Policy, which includes the Rider attached to the Group Policy. *See Rud v. Liberty Life Assur. Co. of Boston*, 438 F.3d 772, 775 (7th Cir. 2006) ("The policy *is* the plan, so far as disability benefits are concerned, and the recital [of discretionary authority] in the policy that we quoted thus determines the scope of judicial review[.]") (internal citation omitted).

The Rider to the Group Policy, in the section titled "Authority to Interpret Policy," expressly grants discretionary authority to United of Omaha:

> By purchasing the policy, the Policyholder grants United of Omaha Life Insurance Company the *discretion and the final authority* to construe and interpret the policy. This means that United has the authority to decide all questions of eligibility and all questions regarding the amount and payment of any policy benefits within the terms of the policy as interpreted by United. In making any decision, United may rely on the accuracy and completeness of any information furnished by the Policyholder or an insured person. United's interpretation of the policy as to the amount of benefits and eligibility shall be binding and conclusive on all persons.

(Def. Apdx. Ex. A, Group Policy) (emphasis added).

The "Authority to Interpret Policy" provision is the functional equivalent of the safe harbor language commended by the Seventh Circuit in *Diaz* and *Herzberger*. Indeed, the "Authority to Interpret Policy" provision is far more descriptive of the breadth of United of Omaha's discretionary authority than the Seventh Circuit's one-sentence safe harbor language. Pursuant to the "Authority to Interpret Policy" provision, United of Omaha has the "*discretion* and *final authority*" to construe and interpret the Group Policy. United of Omaha's discretion and final authority includes "the *authority* to *decide all questions* of eligibility" and "*all questions* regarding the amount and payment of any policy benefits." The provision explains

that the grant of "discretion and final authority" means that United of Omaha's interpretation of the policy "shall be *binding* and *conclusive* on all persons." (Def. Apdx. Ex. A, Group Policy) (emphasis added). The language of the Group Policy clearly conveys that United of Omaha has discretionary authority. *See Gutta v. Standard Select Trust Ins*., No. 04 C 5988, 2006 WL 2644955, at *14 (N.D. Ill. Sept. 14, 2006) (holding that language in a group insurance policy granting to the administrator "[t]he full and exclusive ability to resolve any questions regarding the plan's administration, interpretation, and application when administering benefits is another way of saying that the plan administrator has discretion.").

II. Discretionary Language In The Group Policy Warrants Judicial Review Under The Arbitrary And Capricious Standard.

Despite the clear grant of discretionary authority in the Group Policy, Orlando seeks *de novo* review rather than judicial review under the arbitrary and capricious standard. Specifically, Orlando questions whether West Monroe authorized, knew about or ever received a copy of the Rider. The testimony taken pursuant to Fed. R. Civ. P. 30(b)(6) establishes, however, that West Monroe purchased the Group Policy and Rider as its group disability insurance policy, and that United of Omaha delivered the Group Policy and Rider to West Monroe.

A. United of Omaha delivered the Group Policy and Rider to West Monroe.

The sole basis for Orlando's argument that West Monroe did not know about or agree to United of Omaha's discretionary authority is the mere fact that the Rider was not among the documents produced by West Monroe in response to his subpoena.[1] Orlando's proffered rationale is immediately suspect, because West Monroe did not produce the *entire Group Policy*,

[1] Magistrate Judge Denlow allowed Orlando to take limited discovery solely on the issue of ERISA preemption. Hence, Orlando's subpoena to West Monroe. Judge Coar subsequently held that Orlando's claims are preempted and governed by ERISA. *Orlando v. United of Omaha Life Ins. Co.*, No. 06 C 3758, 2007 WL 2875241, at *5 (N.D. Ill. Sept. 30, 2007) ("The Policy and Booklet unmistakably demonstrate that ERISA applies to the insurance plan at the basis of Orlando's claims.").

not merely the Rider. But Orlando, inconsistently, does not question the validity of the Group Policy simply because it was not produced by West Monroe. Rather, he questions only the validity of the Rider, which is a part of the Group Policy, in an improper attempt to cherry pick United of Omaha's discretionary authority out of West Monroe's ERISA Plan.

The deposition testimony of West Monroe's human resources director, Paulette McKissic, however, establishes that the grant of discretionary authority to United of Omaha is consistent with her understanding of the coverage purchased by West Monroe. Moreover, the deposition testimony of United of Omaha's senior account assistant, Donna Carling, establishes that the Group Policy and Rider were sent to West Monroe by U.S. Mail on April 1, 2003.

Paulette McKissic, West Monroe's designated Rule 30(b)(6) witness, worked directly with West Monroe's president and its insurance broker, Steven Persky, to purchase group disability insurance coverage for the company's employees. Ms. McKissic testified that she reviewed the terms of the Group Policy, and that its contents accurately reflected the terms of the coverage purchased by West Monroe:

> Q: (by Mr. von Schleicher): Did you ever review the group policy?
>
> A: (by Ms. McKissic): Yes.
>
> Q: And when you reviewed it, everything that was in the group policy appeared, based on your knowledge, to reflect the agreement for the terms of the long-term disability coverage provided by – or purchased by West Monroe; correct?
>
> A: Yes.

(Def. Apdx. Ex. C, McKissic Dep., pg. 55).

During her deposition, Ms. McKissic specifically read the "Authority to Interpret Policy" provision of the Rider and testified that the grant of discretionary authority to United of Omaha

was *consistent* with her understanding of the disability insurance coverage purchased by West Monroe:

> Q: (by Mr. von Schleicher): If you can turn to Exhibit 3 and the next to the last page [*i.e.*, the Group Policy Rider]. I'm going to read the last line of that page just above United of Omaha. [T]he first paragraph there says, "By purchasing the policy." Do you see that?
>
> A: (by Ms. McKissic): Yes.
>
> Q: "By purchasing the policy, the policyholder grants United of Omaha Life Insurance Company the discretion and the final authority to construe and interpret the policy. This means that United has the authority to decide all questions of eligibility and all questions regarding the amount and payment of any policy benefits within the terms of the policy as interpreted by United." Do you see that?
>
> A: Yes.
>
> Q: Is that something that seems to you consistent with the type of coverage that was purchased by West Monroe with respect to long-term disability.
>
> Mr. Orlando: Objection. Calls for legal conclusion. Lack of foundation and speculation.
>
> The Witness: Yes.
>
> Q: (by Mr. von Schleicher): You can answer.
>
> A: Yes.
>
> Q: Oh, it is something that is consistent with –
>
> A: Yes.
>
> Q: — with the type of coverage that was purchased by West Monroe?
>
> A: Yes.

(Def. Apdx. Ex. C, McKissic Dep., pg. 55).[2]

Orlando also deposed United of Omaha's designated Rule 30(b)(6) witness, Donna Carling, a senior account assistant at Mutual of Omaha's Chicago office. Ms. Carling testified that the Rider containing the "Authority to Interpret Policy" provision is part of *every* group disability insurance policy issued by United of Omaha in Illinois:

> Q: (by Mr. Orlando): Do you know how this rider became a part of the master contract?
>
> A: (by Ms. Carling): It's always a part of our master contract. It's in every contract we write.
>
> Q: Did you ever discuss this particular rider, the authority to interpret policy provision with anyone at West Monroe Partners?
>
> A: It was communicated to them by giving them the policy, but I did not have a conversation about it.

(Def. Apdx. Ex. D, Carling Dep., pg. 44).[3] United of Omaha simply does not sell group disability insurance coverage to employers in Illinois unless the policy contains a grant of discretionary authority. Employers who desire group disability coverage without discretionary language must purchase their coverage elsewhere (and pay a steep premium).

Ms. Carling clearly articulated the chronology of events that culminated in the delivery of the Group Policy, including the Rider, to West Monroe. Ms. Carling testified that on March 5, 2003, she received a telephone call from Paulette McKissic of West Monroe because "she [Ms.

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[2] The exhibits marked at the deposition of Ms. McKissic and Ms. Carling are attached to their respective transcripts (Def. Apdx. Exs. C and D) with the exception of one voluminous exhibit produced by West Monroe, Bates numbered WMP 0062 to WMP 0248, and marked as both McKissic Dep.-Ex. 4 and Carling Dep.-Ex. 2. This group exhibit consists of an administrator's manual (which includes blank claim forms and other miscellanea) and the Certificate Booklet. (*See* Def. Adpx. Ex. D, Carling Dep., pgs. 24-27).

[3] Donna Carling testified that the term "master contract" and "master policy" are synonymous terms for the document defined in this Memorandum as the Group Policy. (Def. Apdx. Ex. D, Carling Dep., pg. 10).

McKissic] was looking for her booklets and master contract material." (Def. Apdx. Ex. D, Carling Dep., pg. 37). As a result of Paulette McKissic's telephone inquiry, Ms. Carling sent an email to United of Omaha's contract department in Omaha, Nebraska on March 5, 2003, stating: "Please advise of the status of the electronic booklets and the master contract material?" (Def. Apdx. Ex. D, Carling Dep.-Ex. 6). On the printed email, Ms. Carling handwrote: "3/5/03 – Paulette @ West Monroe called to follow-up?!" (Def. Apdx. Ex. D, Carling Dep.-Ex. 6).

On March 7, 2003, Ms. Carling sent the Certificate Booklet to Paulette McKissic as an email attachment. (Def. Apdx. Ex. D, Carling Dep., pgs. 37-38). In the email, Ms. Carling informed Paulette McKissic that the master contract and a token supply of Certificate Booklets would be sent to her by mail:

> Paulette,
> Attached below is the electronic PDF file of your certificate-booklet for the long term disability benefits. A small token supply of the booklets along with the master contract material will follow in the mail within the next two weeks.

(Def. Apdx. Ex. D, Carling Dep.-Ex. 7).

Shortly thereafter, on March 11, 2003, United of Omaha's contract department delivered the "master contract" to Ms. Carling, together with an instruction sheet (titled "Insynch Mail Instruction Sheet") identifying each and every document that comprises the master contract to be sent to West Monroe. Specifically, Ms. Carling testified that the third page of the Insynch Mail Instruction Sheet identifies the documents that she personally mailed to West Monroe as the Group Policy:

> Q: (by Mr. von Schleicher): What did you do with the Insynch Mail Instruction Sheet?
>
> A: (by Donna Carling): Along with this [the Insynch Mail Instruction Sheet] came the master contract and the certificate booklet, and on the third page of the document [the Insynch Mail Instruction Sheet]

> it outlines exactly what is included in the package and made sure that all the documents were included; and then I mailed the policyholder copy to Paulette McKissic and the broker copy – well, Steve Persky, the broker was copied in on the letter that included the master contract, certificate booklet.

(Def. Apdx. Ex. D, Carling Dep., pg. 46).[4]

During her deposition, Ms. Carling went through each document listed on the third page of the Insynch Mail Instruction Sheet that comprises the master policy, and matched those documents with the corresponding page of the Group Policy that she mailed to West Monroe. The Insynch Mail Instruction Sheet lists form number "7000GM-U-EZ 2001" (which corresponds to the first six pages of the Group Policy), form number "2024GR-EZ" (which corresponds to the Rider granting discretionary authority to United of Omaha), the "eligibility addendum" (which corresponds to the Eligibility Addendum on page 8 of the Group Policy), form number "105GR-EZ" (which corresponds to the Premium Rider on page 9 of the Group Policy), form number "9763GI-EZ-IL 00" (which corresponds to page 10 of the Group Policy — titled Illinois Life and Health Insurance Guaranty Association Act), and form number 10634GA-MU-EZ STD/LTD" (which corresponds to the application for insurance).[5] Every document listed in the Insynch Mail Instruction Sheet matches and is accounted for in the Group Policy.

Ms. Carling testified that on April 1, 2003, she mailed the Group Policy (which included the Rider) and a token supply of Certificate Booklets to Paulette McKissic of West Monroe. (Def. Apdx. Ex. D, Carling Dep., pgs. 46-47). Ms. Carling's April 1, 2003 cover letter to Ms. McKissic states:

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[4] The Insynch Mail Instruction Sheet was marked as Carling Dep. Ex. 5. (Def. Apdx. Ex. D, Carling Dep.-Ex. 5).

[5] The application for insurance was marked as Carling Dep. Ex. 4. (Def. Apdx. Ex. D, Carling Dep.-Ex. 4).

Re: Group Long Term Disability Policy: GLTD-86F9

Dear Paulette:

Enclosed you will find the following materials for the above referenced policy:

1.) Master Contract Material
2.) Certificate Booklet
3.) Countersigned Copy of the Electronic Reproduction Agreement for your file.

If you should have any questions or if I may be of any further assistance, please feel free to contact me….

Sincerely

Donna Carling
Account Assistant

(Def. Apdx. Ex. D, Carling Dep.-Ex. 3). Ms. Carling confirmed that the Group Policy (Def. Apdx. Ex. A, which was marked as Carling Dep.-Ex. 8) is a correct copy of the master contract that she mailed to Paulette McKissic at West Monroe on April 1, 2003. (Ex. D, Carling Dep., pg. 47).

The testimony of West Monroe and United of Omaha establishes, therefore, that West Monroe purchased the Group Policy, that the grant of discretionary authority to United of Omaha is consistent with West Monroe's understanding of the insurance contract that it purchased, and that United of Omaha delivered the Group Policy to West Monroe. Accordingly, the Group Policy, including the "Authority to Interpret Policy" provision of the Rider, establishes the terms of West Monroe's ERISA Plan.

B. The grant of discretion in the Group Policy controls over silence in the summary plan description.

As his fallback position, Orlando argues that even if West Monroe granted discretionary authority to United of Omaha, he was never *personally told* that United of Omaha has discretion.

As a threshold matter, Orlando had notice that his coverage, as described in the Certificate Booklet, was subject to the terms of the Group Policy. The Certificate Booklet specifically refers employees to the Group Policy, and states that coverage is subject to the terms of the Group Policy. As stated in the Certificate Booklet:

> United of Omaha Life Insurance Company certifies that Group Policy No. GLTD-86F9 (Policy) has been issued to West Monroe Partners, LLC (Policyholder).
>
> Insurance is provided for certain employees as described in the Policy.
>
> *The benefits described in this Certificate are subject to the terms and conditions of the Policy*.

(Def. Apdx. Ex. B, Certificate Booklet, Bates No. WMP 192) (emphasis added).[6] Even Orlando does not dispute that if he had read the Group Policy, he would have known that United of Omaha has discretionary authority. Orlando cannot nullify United of Omaha's discretionary authority, and alter the terms of his employer's ERISA Plan, simply by refusing to inquire further and look for himself at the terms of the Group Policy.

Fundamentally, however, Orlando misconstrues Seventh Circuit authority regarding the determination of the standard of judicial review. According to Orlando, employees *literally* must be *told* that the administrator has discretionary authority, based on the Seventh Circuit's statement in *Diaz* and *Herzberger* that if an administrator wants to retain discretionary authority, "the employees should be told about this, and told clearly." *Diaz*, 424 F.3d at 637 (*quoting Herzberger*, 205 F.3d at 333). The comments in *Herzberger* and *Diaz* regarding notice to plan participants relate to whether *the discretionary language in the written terms of the Plan* communicates with sufficient clarity that the administrator has discretionary powers, and not

[6] During the Rule 30(b)(6) deposition of United of Omaha, Ms. Carling identified the Certificate Booklet as the document produced by West Monroe Bates numbered WMP 0186 to WMP 0224, which was contained within McKissic Dep. Ex. 4 and Carling Dep. Ex. 2. The Certificate Booklet has been submitted to the court as Def. Apdx. Ex. B.

whether the employees literally were told about the administrator's discretionary authority.

In *Semien v. Life Ins. Co. of North America*, 436 F.3d 805 (7th Cir.), *cert. denied*, 127 S.Ct. 53 (2006), the Seventh Circuit held that the "arbitrary and capricious" standard of review applied, even though the plaintiff had not received a summary plan description describing the terms of the ERISA plan until after her disability claim had been denied. The plaintiff in *Semien* argued that judicial review should be *de novo* because she had not been *told* that the Plan granted discretionary authority to the insurer, LINA. The Seventh Circuit rejected the plaintiff's argument.

The *Semien* court held that whether or not a handbook containing discretionary language was distributed to employees was of *no consequence* in determining the standard of review. Rather, the fact that the Plan and the Administrative Services Agreement—neither of which was distributed to the employees—granted discretionary authority to LINA was sufficient to warrant judicial review under the arbitrary and capricious standard. As stated by the court in *Semien*:

> Regardless of whether the hand-book was properly considered, the BP Long-Term Disability Plan, coupled with the Administrative Services Agreement between BP and LINA, established LINA's authority and requires that decisions by the plan administrator be reviewed under an arbitrary and capricious standard.

Id., at 810. *See also Kuchar v. AT&T Pension Benefit Plan-Midwest Program*, No. 06 C 0059, 2007 WL 838985, at *3 (N.D. Ill. Mar. 13, 2007) (holding that the presence of discretionary language in the Plan "gives Plan participants adequate notice that the Plan Administrator will make decisions that are largely insulated from judicial review by reason of being discretionary.").

Orlando wants the court to determine the standard of review based on the contents of the Certificate Booklet. Because the Certificate Booklet is silent on the issue of discretion, Orlando

concludes that he was not told that United of Omaha has discretionary authority. Orlando, in short, contends that silence in the Certificate Booklet trump the terms of the Group Policy.

There is no requirement under ERISA that discretionary language must be disclosed in the summary plan description. Thus, Orlando cannot legitimately argue that the absence of discretionary language in the Certificate Booklet trumps and invalidates the discretionary language in the Group Policy. *See Mers*, 144 F.3d at 1023 ("[I]in the Seventh Circuit, an SPD's silence on an issue does not estop a plan from relying on the more detailed policy terms when no direct conflict exist.").[7]

ERISA requires plan administrators to furnish participants and beneficiaries with a summary plan description. 29 U.S.C. §1022(a). But a summary plan description is merely a summary of select portions of the Plan, and not a recitation of all the terms of the Plan. The absence of discretionary language in the Certificate Booklet, therefore, does not invalidate the discretionary language in the Group Policy. Otherwise, "[i]f silence in the SPD were enough to trump the underlying plan, then SPDs would mushroom in size and complexity until they mirrored the plans." *Mers*, 144 F.3d at 1024.

ERISA's regulations specify the information that must be disclosed in the summary plan description. 29 C.F.R. §2520.102-3. A summary plan description must describe the "conditions which must be met before a participant will be eligible to receive benefits," 29 C.F.R. §2520.102-3(*j*)(1), and contain a statement "clearly identifying circumstances which may result in disqualification, ineligibility, or denial … of any benefits that a participant … might otherwise reasonably expect the plan to provide on the basis of the description of benefit," 29 C.F.R.

[7] By contrast, when there is a *direct* conflict between the summary plan description and the plan, the employee may be entitled to enforce the summary plan description, but only if there was reasonable detrimental reliance. *See, e.g., Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144, 1149 (7th Cir. 1999). Orlando could not satisfy the reasonable reliance element, because he was told that the Certificate Booklet was subject to the terms and conditions of the Group Policy.

§2520.102-3(*l*). ERISA's regulations, however, do not mandate disclosure of an administrator's discretionary authority.

Every federal court that has addressed the issue has held that when discretionary language is contained in the Plan but not in the summary plan description, the terms of the Plan control, mandating application of the arbitrary and capricious standard of review.

In *Fenton v. John Hancock Mutual Life Ins. Co*., 400 F.3d 83 (1st Cir.), *cert. denied*, 546 U.S. 873 (2005), for example, the First Circuit rejected the plaintiffs' argument that, despite the presence of discretionary language in the group policy, the standard of review should be *de novo* because discretionary authority was not disclosed in the summary plan description. The *Fenton* court, after quoting the discretionary language in the group policy, held:

> Despite this language [in the group policy], the former employees contend that the arbitrary and capricious standard is inapplicable when, as here, a grant of discretionary authority is not found in the summary plan description. We are unpersuaded. The silence of the summary plan description on the issue of the administrator's discretion does not create a direct conflict with any particular Plan provision and therefore does not warrant *de novo* review.

Id., at 90 (*citing Martin v. Blue Cross & Blue Shield of Virginia, Inc*., 115 F.3d 1201, 1205 (4th Cir.), *cert. denied*, 522 U.S. 1029 (1997) ("Vesting the plan administrator with discretion in making coverage decisions simply does not conflict with the SPD's silence on the matter."); *Wald v. Southwestern Bell Corp. Customcare Medical Plan*, 83 F.3d 1002, 1006 (8th Cir. 1996) (rejecting the plaintiff's argument that the summary plan description must disclose the administrator's discretionary authority in order to trigger the arbitrary and capricious standard).

See also Tocker v. Philip Morris Companies, Inc., 470 F.3d 481, 488-489 (2nd Cir. 2006) (holding that ERISA's regulations do not require the disclosure of discretionary authority as part of the summary plan description and that the plaintiff was not prejudiced thereby); *Cagle v.*

Bruner, 112 F.3d 1510, 1517 (11th Cir. 1997) (holding that the arbitrary and capricious standard is warranted when discretionary language is contained in the plan, but not in the summary plan description); *Nash v. Mercedes Benz USA*, 489 F.Supp.2d 411, 417 (D.N.J. 2007) ("[T]he Court finds, as other courts have found, that where the pension plan contains language granting discretionary authority, silence in the summary plan description regarding the grant of discretion is not a conflict and apply the arbitrary and capricious standard.").

CONCLUSION

Where, as here, the plan documents contain discretionary language, "then a denial of benefits will be reviewed under an arbitrary and capricious standard." *Militello v. Central States, Southeast and Southwest Areas Pension Fund*, 360 F.3d 681, 685 (7th Cir.), *cert. denied*, 543 U.S. 869 (2004) (*citing Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001)). The presence of clear discretionary language in the plan itself is all that is needed to confer the administrator with discretionary authority. Because the Group Policy contains clear language granting discretionary authority to United of Omaha, the applicable standard of judicial review is the arbitrary and capricious standard.

WHEREFORE, defendant, UNITED OF OMAHA LIFE INSURANCE COMPANY, respectfully requests that the court issue an order declaring that the applicable standard of judicial review is the arbitrary and capricious standard.

Respectfully submitted,

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By: /s/ Warren von Schleicher
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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2008, I electronically filed the attached document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Thomas B. Orlando
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Respectfully submitted,

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