SPDs, Fiduciary Communications, and Remedies: Commentary from around the ERISA bar on CIGNA v. Amara, 131 S. Ct. 1866 (May 16, 2011)

Facts of the Case

CIGNA Corp. converted its traditional defined benefit pension plan to a cash-balance plan in 1998. For participants who had participated in the pre-conversion plan, CIGNA provided a benefit of the greater of their accrued benefit under the old plan at the date of conversion, or their benefit under the new plan. For some participants, this “greater of” system resulted in no new accruals of benefits for a period of time after conversion until their benefit under the new plan caught up to and exceeded their frozen benefit under the old plan. A class of participants challenged the conversion, claiming among other things that CIGNA failed to give them proper notice of a reduction in future benefit accruals under ERISA § 204(h), 29 U.S.C. § 1054(h), and asking the district court to invalidate the conversion. At issue were misrepresentations that the new plan would enhance benefits, and in an SPD, some of which the district court found were intentionally misleading.

The district court agreed that CIGNA violated its disclosure obligations under Sections 204(h) and 104(b), that the SPD misrepresented the terms of the plan, and that those failures had caused the participants “likely harm.” Under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), it reformed the plan to provide the frozen benefit plus accruals under the new formula and ordered CIGNA to pay benefits in accordance with the reformed plan. In a summary order the Second Circuit affirmed the district court’s decision.

The Supreme Court granted certiorari to determine whether the “likely harm” standard applied by the district court sufficed as proof of injury, but it determined that to reach that question, it had to consider whether the district court’s relief was authorized under § 502(a)(1)(B), which CIGNA asserted it was not. The Court concluded that § 502(a)(1)(B) does not authorize the relief, and that the SPD is not enforceable under § 502(a)(1)(B) as a plan document, and thus, terms of an SPD that conflict with a formal plan document are not enforceable. It further held that “likely harm” was insufficient and that actual harm must be shown, but that proof of detrimental reliance was not always necessary.

But the Court went on to say that ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), might allow such relief, and it remanded for the lower court to determine whether “appropriate equitable relief” was available for the violations.
and what standard of harm would apply depending on the theory of equitable relief applied. Going further, the Court identified “equitable principles that the court might apply on remand,” announcing among other things that reformation, estoppel, or “surcharge” (make-whole relief from a breaching fiduciary) could be available under Section 502(a)(3) to place participants in the position they were led by fiduciary communications to believe they occupied.

The ERISA bar immediately lit up with discussion of the implications of the decision, including whether the dissent was correct in asserting that the majority’s discussion of relief is *dicta*, what force the decision has if so, and how district courts should apply the holdings on the enforceability of SPDs and the required standard of harm to be shown by a participant alleging injury from a faulty communication regarding his or her benefits. Short commentary follows below from different perspectives: plaintiffs’, defense, and academia.

**Commentary from the Plaintiffs’ bar:**

At bottom, *CIGNA v. Amara* is based on the sensible notion that when an employer deceives its employees about their retirement benefits, it is “doub[ful] that Congress would have wanted to bar those employees from relief.” 131 S. Ct. 1866, 1881 (2011).

When a plaintiff seeks relief under § 502(a)(3) of ERISA, the Court’s precedents now require it to ask whether the relief was “typically available in equity,” back in the days of the divided bench. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (emphasis omitted). If the relief was typically available, then the plaintiff is entitled to it; if not, not. This remarkable doctrine required the Court in *Amara* to rummage through 19th-century treatises to apply a statute enacted in 1974. *See Amara*, 131 S. Ct. at 1879-80.

Nevertheless, *Amara* shows the considerable power of equitable remedies. For while the Court held that the employer’s unfulfilled promises were not themselves part of the “plan,” and thus could not be enforced as “benefits due . . . under the terms of [the] plan,” ERISA § 502(a)(1)(B), it also held that equitable remedies could lead to the same result. Reformation of the plan, equitable estoppel enforced against CIGNA, and surcharge under the terms of the reformed plan—all well-recognized equitable remedies—would put deceived plan participants in just as good a position as § 502(a)(1)(B) would do.

The Court’s emphasis on the flexibility of equity, *see* 131 S. Ct. at 1881, and its intolerance for rights without remedies, *id.* at 1879, is also a broad hint to district courts: when § 502(a)(3) is applicable, district courts have a wide range of remedies at their disposal, and they should not be afraid to use them as justice requires.

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In *Cigna v. Amara*, the Supreme Court clarified the protections available to plan participants under ERISA and took a significant step toward fulfilling the promise of equity, that there shall be no right without a remedy. By holding that a claim under § 502(a)(3) against a breaching fiduciary can result in make-whole relief, *Amara* brings Supreme Court case law in line with congressional intent and the traditional safeguards of trust law. Equitable remedies under § 502(a)(3) now include surcharge (monetary reimbursement for losses caused by a breaching fiduciary), as well as remedies in the nature of injunctive relief such as reinstatement, plan reformation, and equitable estoppel.

Concurring in the judgment only, Justice Scalia (joined by Justice Thomas) makes a diversionary attempt to dismiss as dicta the majority’s analysis of § 502(a)(3) remedies. Many courts, however, have agonized over their perceived inability to compensate participants harmed by violations of ERISA. We can therefore expect most will follow the lead of the *Amara* majority, which held that a remedy can “take[ ] the form of a money
Two further aspects of the Amara decision should also be applied to benefit plan participants. First, the Court held that a showing of individualized detrimental reliance is only required for equitable estoppel, and not for other forms of equitable relief including surcharge and reformation. Fortunately for judicial efficiency, this portion of the decision preserves the ability to bring class actions where there are common injuries to plan participants. Second, while the Court rejected the previously widely-accepted view that a Summary Plan Description (SPD) is a formal governing plan document, under Amara an SPD is a fiduciary communication that must be clear and accurate. Under no circumstances, therefore, should less favorable terms in a defective SPD be given effect. Participants in individual benefits cases should also still be able to rely on case law enforcing more favorable statements in an SPD, even if the basis for some courts’ holdings shifts from § 502(a)(1)(B) to § 502(a)(3). In both class actions and individual benefits cases, the fights to come will be which equitable remedy to apply, and the standards of proof that must be met to prevail.

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Commentary from the Defendants’ bar:

The Supreme Court’s decision in CIGNA v. Amara will have many practical implications for plan sponsors, fiduciaries, and participants in the coming years. Here are two:

First, even assuming the Court’s discussion of remedies under § 502(a)(3) is pure dicta, it nonetheless represents the first time the Supreme Court has signaled that “compensatory,” “make-whole” monetary relief is available under ERISA’s catch-all provision in claims against fiduciaries. The fact that this signal comes from a large majority of justices – seven of the nine if we assume that Justice Sotomayor would agree with the reasoning of the main opinion – is sure to lead to a significant increase in § 502(a)(3) claims. For nearly 20 years, the lower courts overwhelmingly have construed Mertens and later Supreme Court decisions to preclude monetary relief under § 502(a)(3) against all defendants, including fiduciaries, in nearly all circumstances. Amara now appears to invite participants to remake § 502(a)(3) law insofar as it applies to claims against fiduciaries. This result perhaps best can be understood as an effort to correct the harsh outcomes that sometimes resulted in pre-Amara cases, where even truly deserving claimants occasionally found themselves without any remedy at all. The challenge going forward will be to keep the pendulum from swinging so far in its current direction that ERISA’s catch-all remedy overtakes and subsumes the statute’s primary remedies.

Second, the Court’s holding that the terms of an SPD cannot be enforced as if they were terms of the plan appears to overturn the rule adopted by most circuits that an SPD with language more favorable to participants than the plan automatically controls when there is a conflict between the two. That approach now apparently is supplanted by a doctrine that requires plaintiffs to prove the elements of reformation before the more favorable term can be invoked. Courts will have to sort out how such claims will be resolved in the myriad contexts in which they are sure to arise.

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Commentary from the Academy:

Amara is neither a total victory for plan sponsors nor for plan participants. Its holding that an SPD is not part of a plan for purposes of § 502(a)(1)(B) appears to be a clear victory for plan sponsors, although it does raise questions about plans that use wrap-around documents that incorporate SPDs by reference into plan documents. On the other hand, the Court’s guidance to the district court regarding remedies under ERISA §
502(a)(3) offers plan participants hope that the days of “betrayals without a remedy,” caused by the Court’s cramped reading of “equitable relief” together with its broad reading of ERISA’s preemption of state law, are finally coming to a close. Indeed, the Court’s declaration that “a maxim of equity states that ‘[e]quity suffers not a right to be without a remedy,’” 131 S. Ct. at 1879, citation omitted, appears to be a clear signal that the Court intends to solve the problem of betrayals without a remedy.

Although the Court is careful not to overrule any of its prior decisions, it clearly appears to be shifting course by embracing “surcharge,” the historical term for monetary relief in equity, as an appropriate form of equitable remedy under ERISA § 502(a)(3). Of course, the Court’s remedies’ guidance is only dicta. Nevertheless, dicta offered by six members of the Supreme Court is only “utterly irrelevant” to Justice Scalia (and Justice Thomas).

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