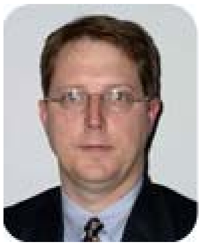
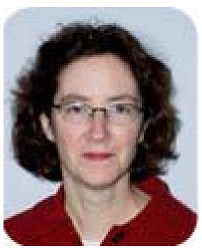
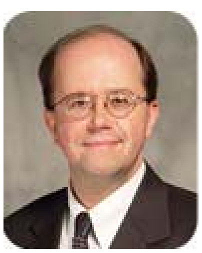
DORSEY™
DORSEY & WHITNEY LLP
USA CANADA EUROPE ASIA-PACIFIC



Timothy E. Branson
Of Counsel
(612) 343-7920
Email



Leslie J. Anderson
Partner
(612) 343-7960
Email



Timothy D. S. Goodman
Partner
(612) 340-2825
Email

May 18, 2011

CIGNA v. Amara: An Unexpected Holding that may Encourage Plaintiff Claims

The Supreme Court's May 16 decision in a closely-followed ERISA case, *CIGNA Corp. v. Amara*, --- S. Ct. ----, 2011 WL 1832824, U.S., May 16, 2011 (NO. 09-804), raises more questions than it answers. Benefit lawyers were generally expecting the Court to determine whether and to what extent an ERISA plan participant or beneficiary may rely on language in a summary plan description (SPD) that conflicts with the actual language of the ERISA plan to establish a claim for benefits under ERISA § 502 (a)(1)(B). A variety of standards have been adopted in the lower courts, but the ability to proceed in such a case where the SPD and the plan document conflict with a claim for benefits under § 502(a)(1)(B) had been widely recognized. However, contrary to the law in most circuits, the Supreme Court ruled as a threshold matter, with eight justices in agreement (Justice Sotomayor did not participate in the case), that an SPD is not part of an ERISA plan and, therefore, may not be used to bring a claim for plan benefits under§ 502(a)(1)(B).

Background

The source of this case is CIGNA's conversion of a final average formula defined benefit plan to a cash balance plan in 1998. Plaintiffs claimed CIGNA failed to give appropriate notice of the changes to the defined benefit plan. *See* 29 U. S. C. §§1022(a), 1024(b), 1054(h) (2006) (ERISA §§ 102(a), 104(b), 204(h)). In 2008, the District Court held CIGNA violated ERISA's notice and disclosure requirements because the SPDs and summaries did not explain that benefits would be subject to a "wear away." *See* 534 F. Supp. 2d 288 (D. Conn. 2008). Subsequently, the District Court found the SPD was a plan document and ordered the plan statement be reformed to provide better benefits. *See* 559 F. Supp. 2d 192 (D. Conn. 2008). In essence, the District Court ruled that there was a conflict between the SPD and the plan statement and that the SPD governed how the plan should be interpreted. The Second Circuit subsequently affirmed the District Court's decision. On appeal to the Supreme Court, CIGNA raised a number of issues, including whether § 502(a)(1)(B) authorized the relief.

Expansion of Relief Under Section 503(a)(3) of ERISA

The Court held that § 502(a)(1)(B) did not grant the District Court the power to reform the plan. Because the lower court had granted relief under § 502(a)(1)(B), the lower court's decision was reversed. Although Justices Scalia and Thomas would have stopped there, the Court's six-justice majority opinion went on to discuss that conflicts between an SPD and plan may give rise to claims for other appropriate equitable relief under § 502(a)(3), including an obscure equitable claim called "surcharge" that might effectively authorize money damages, in contravention of the

Court's earlier decision in *Mertens v. Hewitt Associates*, 508 U. S. 248 (1993). In *Mertens*, the Court held that the authorization in § 502(a)(3) for "appropriate equitable relief" was limited to traditional equitable remedies such as restitution, injunction and mandamus, and did not include damages or other remedies that equity courts could historically award in trust cases (the "equitable clean-up doctrine"). Accordingly, monetary recovery would be allowed under § 502(a)(3) only as necessary to prevent unjust enrichment and allow specific funds to be traced and disgorged. In the wake of that ruling, ERISA fiduciaries have frequently been successful over the past 15+ years in arguing that because they were not unjustly enriched by the claimed breach of fiduciary duty, plaintiffs are not entitled to any recovery, even if the plaintiffs did sustain damages, because damages are unavailable under § 502(a)(3). (Indeed, in a remarkable coincidence, the Fourth Circuit issued an opinion on the same day as CIGNA rejecting a "surcharge" claim as beyond the scope of § 502(a)(3)). These successes might be a thing of the past if the Court's discussion of remedies, reasonably labeled as "dicta" by Justice Scalia's concurrence, ultimately becomes the law of the case after remand.

The *Amara* majority distinguished *Mertens* on the ground that the defendant in *Mertens* was not an ERISA fiduciary.

Although not briefed in *Amara*, the discussion of surcharge in the majority opinion echoes arguments that the United States Department of Labor has been making in other cases. The majority indicated that monetary compensation for a loss from a fiduciary's breach of duty was allowed, and called a "surcharge." Finally, on the liability predicate to surcharge, the majority indicated that detrimental reliance on the language in the SPD that turned out to be inconsistent with the plan document would not be required. Harm and causation would be required, but the more rigorous detrimental reliance standard would not be. Plaintiffs will likely argue that the absence of such requirement may allow class actions to survive, because individual, class-defeating issues of reliance can be avoided. On the other hand, defendants will likely argue that in many cases harm cannot be demonstrated.

Can an SPD be a Plan?

The *Amara* court assumes that ERISA SPDs are entirely distinct from and summaries of separate plan documents. Typically, however, health and welfare benefit plans either use the SPDs as plan documents or incorporate them into plan documents by reference under the terms of a "wrap plan." The Court in *Amara* did not address such arrangements. Presumably if an SPD is described as also serving as the plan document, or a component of the plan document, then a § 502(a)(1)(B) claim can be premised on its terms. Part of the *Amara* Court's reasoning, however (that SPDs are of necessity simpler and easier to understand versions of more technical plan documents), might arguably raise some questions about one document serving as both the plan and SPD. Moreover, the same concern is raised by Justice Scalia's statement (concurrence, p. 2) that an SPD "would not fulfill its purpose of providing an easily accessible summary of the plan if it were an authoritative part of the plan itself." As a practical matter, the terms of health, life and disability benefits will likely continue to be described, at least in part, in a single document that serves both as the SPD and the plan document. Plan sponsors may, however, want to review, and possibly clarify, the designation of exactly what constitutes the plan documents for these benefits as well as consider whether their SPDs are sufficiently easy to understand to satisfy ERISA's SPD requirements. Further, it will be interesting to see how, if at all, the regulators respond to the SPD versus plan comments in *Amara.*

Conclusion

The ultimate result in *Amara* is unknown, because the Court's discussion of § 502(a)(3) was for the lower court to apply on remand to the facts and circumstances of the case. What is known is that Amara underscores the need for careful consideration of the terms of SPDs and other notices given to ERISA beneficiaries regarding the terms of their benefit plans. If you wish to discuss *Amara* and its impact, please contact the attorney in the ERISA Litigation or Benefits and Compensation practice group with whom you work.