Must Each Plan Participant Prove Detrimental Reliance on an Inaccurate Summary Plan Description to Recover in an ERISA Class Action?

CASE AT A GLANCE

Under the Employee Retirement Income Security Act (ERISA), plan administrators must provide all plan participants with a summary plan description (SPD) summarizing the plan terms. After CIGNA converted its traditional defined benefit pension plan to a cash balance retirement plan, it issued an SPD to participants. Janice Amara, a plan participant, filed a class action lawsuit claiming that CIGNA failed to comply with ERISA notice requirements because the SPD failed to adequately notify participants of the "wear away" effect of the plan. The issue before the Court is whether each of the 27,000 members of the class action must prove detrimental reliance on the SPD in order to receive damages.

CIGNA Corp. v. Amara
Docket No. 09-804

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From: The Second Circuit

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ISSUE

Must participants who are members of a class action suit prove detrimental reliance on an inaccurate summary plan description in order to receive a remedy under ERISA, or is the mere proof of "likely harm" enough to justify equitable relief?

FACTS

In this class action, plaintiffs challenged CIGNA's conversion of a defined benefit pension plan to a cash balance retirement plan on the grounds that CIGNA violated the disclosure requirements of the Employee Retirement Income Security Act (ERISA) by failing to describe the "wear away" effect of the replacement cash balance plan.

In an effort to save costs, CIGNA replaced its defined benefit plan with a cash balance plan retroactively effective to January 1, 1998. After the conversion, some participants had opening account balances in the cash balance plan that were less than the value of the participant's accrued benefit under the now-terminated defined benefit plan. This phenomenon—called a "wear away"—was the result of interest rate fluctuations between the traditional plan and the cash balance plan. A participant suffers from the effects of wear away when his account balance in the cash balance plan is less than the minimum benefit he would have received under the defined benefit plan. In some cases, the wear away effect continued for years.

In November 1997, after CIGNA froze its defined benefit plan but before it implemented the cash balance plan, CIGNA sent all employees a special edition "Signature Benefits Newsletter." Entitled "Introducing Your New Retirement Program," it described the upcoming conversion to the cash balance plan. In October 1998, CIGNA issued a summary plan description (SPD) and summary of material modifications (SMM) for the cash balance plan, and a nearly identical version was reissued in September 1999. Although the SPD described how a cash balance account grows, including how pay and interest credits accrue, the SPD did not mention or explain wear away. The SPD specifically stated that "the amount of accumulated benefit in your account … [will] continue to grow every year you are with CIGNA."

Plaintiffs sued alleging that the cash balance plan discriminated against participants on the basis of age and violated ERISA's rules against the backloading of benefits. The district court rejected plaintiffs' claims of discrimination and violation of ERISA's substantive requirements, but held that CIGNA violated ERISA's disclosure requirements when it issued an SPD that failed to advise participants of the possible wear away. The court ordered the parties to brief the issue of available remedies in an ERISA class action.

After reviewing the parties' briefs, the district court held that the manner in which CIGNA implemented the conversion from the defined pension plan (called Part A) to the cash balance plan (called Part B) was unlawful because CIGNA materially misled participants about the potential wear away effect. The court held that the "[t]hese statements taken as a whole created a reasonable expectation on the part of plan participants that Part B would protect *all* Part A benefits … in the opening account balance or the Part B protected minimum benefit, and that Part B benefits would begin accruing immediately." *Amara v. CIGNA Corp.*, 559 F. Supp. 2d 192, at 211 (D. Conn. 2008).

The court ordered CIGNA to reform its records to indicate that all affected class members are entitled to the total of Part A benefits plus Part B benefits. In other words, a participant is entitled to accrued benefits under the defined benefit plan at the time of the conversion (Part A) plus the benefits accrued under the cash balance plan (Part B). The court noted that this would eliminate any potential wear away effects because an opening balance would no longer be used to calculate benefits. The court ordered CIGNA to provide each participant with a notice of additional benefits to which he is entitled. The court further ordered CIGNA to issue an accurate SPD for the cash balance plan.

The court held that because the terms of the SPD and the SMM were misleading, those terms were deemed to be incorporated into the plan itself. Therefore, participants could sue under § 502(a)(1)(B) to recover benefits due under the terms of the plan.

The court acknowledged that this was a case of first impression in the Second Circuit and that the law "is anything but settled." Thus, the court agreed to stay its judgment so that the parties could proceed to the Second Circuit for guidance. Both parties appealed. Rather than providing the requested guidance, the Second Circuit summarily affirmed the judgment of the district court, noting that the district court's opinion was "well reasoned." *CIGNA Corp. v. Amara,* 348 Fed. Appx. 627 (2d Cir. Oct. 6, 2009). CIGNA then appealed to the Supreme Court.

CASE ANALYSIS

ERISA § 502(a)(1)(B) authorizes a participant or beneficiary to obtain legal relief to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." In contrast, ERISA § 502(a)(3) is a "catch-all provision" that authorizes equitable relief when legal relief is unavailable under § 502(a)(1)(B).

CIGNA contends that the lower courts erred in permitting recovery under § 502(a)(1)(B) because under that section a participant may sue only to enforce the terms of the plan and an SPD is a summary of the plan and not the plan itself. Because an SPD is not a plan, the Second Circuit erred when it held that participants could recover under § 502(a)(1)(B) based on an inconsistency between an SPD and the plan. CIGNA argues that an "SPD is no more a 'plan' than a syllabus to one of this Court's opinions is itself an opinion." CIGNA also states that ERISA's structure confirms this conclusion because "the statute repeatedly treats an SPD as different from 'written instrument' through which the plan is maintained."

Moreover, CIGNA argues that ERISA assigns different parties responsibility for drafting the SPD and the plan. The plan sponsor drafts the plan document and the plan administrator drafts the SPD. Furthermore, a plan sponsor may amend a plan only by complying with the plan's procedure, *Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73 (1995), and not by issuing an SPD that is inconsistent with the plan. CIGNA further states that the SPD explicitly provides that its terms do not modify the plan's terms and that the plan controls in the event of any discrepancy. CIGNA states that "[b]ecause an SPD is not itself an ERISA plan, and because the SPDs in this case could not have amended the terms of the CIGNA Plan, respondents are not entitled to relief under ERISA § 502(a)(1)(B)", which permits recovery of benefits due under the *terms of the plan*.

CIGNA contends that relief should only be available under ERISA § 502(a)(3) and then only for breach of fiduciary duty or equitable estoppel. CIGNA criticizes an interpretation of ERISA that would allow an SPD to modify the terms of the plan only if the SPD is less favorable than the plan. CIGNA describes such an interpretation of ERISA—where an inconsistent SPD modifies a plan only if it reduces benefits and does not enhance them—as "a one-way ratchet that finds no support in the text" of ERISA. This one-way ratchet, claims CIGNA, which is premised on equitable principles of fairness, falls comfortably under ERISA's catch-all provisions under § 502(a)(3), and not under § 502(a)(1)(B).

Finally CIGNA argues that under § 502(a)(3) each participant must prove detrimental reliance to recover. Although in interpreting ERISA, courts typically rely on trust law, "[t]rust law… adds little here." Instead, CIGNA argues that the most analogous common law action is one for an economic tort based on misrepresentation, which requires proof of detrimental reliance. CIGNA argues that a "plaintiff who has not read and detrimentally relied upon an SPD has not suffered an injury caused by an inconsistency between the SPD and the plan. Requiring proof of detrimental reliance confines the cause of action to those sorts of injuries that ERISA's disclosure requirements were designed to prevent."

In response, Amara states that "[t]he duty to disclose complete and accurate information in trust law … supports [its] position that a fiduciary cannot mislead beneficiaries and then place the burden on each beneficiary to prove how things would have been different with disclosure."

Amara emphasizes that CIGNA made "downright misleading" misrepresentations in order to avoid a "backlash" from employees whose benefits had been reduced by the conversion of the defined benefit plan to the cash balance plan. Amara stresses that according to a survey conducted by CIGNA, 92 percent of participants surveyed read the SPD in a thorough fashion. Moreover, during the trial, many participants testified that they read the SPD.

Amara relies on Supreme Court precedent in *Kennedy v. DuPont,* 129 S. Ct. 865 (2009), in which the Court held that an SPD is a document that governs the plan. ERISA requires trustees to manage the plan in accordance with the terms of the plan documents under § 404(a)(1)(D). Amara points out that every circuit that has ruled on the issue has held that where the plan and the SPD conflict, the SPD controls. This principle is premised on the fact that as the drafter of the SPD, the plan sponsor must bear the burden of any inconsistency. Amara therefore contends that participants are entitled to obtain their benefits under the terms of the plan without the undisclosed wear away provision.

Amara further relies on *Heidgerd v. Olin Corp.,* 906 F.2d 903 (2d Cir. 1990), in which the Second Circuit stated that, "to allow the plan to contain different terms that supersede the terms of the summary would defeat the purpose of providing the employees with summaries." Amara asserts that, "any other rule would be grossly unfair to employees and would undermine ERISA's requirement of an accurate and comprehensive summary." (quoting *Hansen v. Continental Ins. Co.,* 940 F.2d 971 (5th Cir. 1991).) Amara refutes CIGNA's argument that an SPD may not amend a plan unless the plan's amendment procedures so permit, by asserting that statements and omissions in SPDs are not "amendments" to the plan but, instead, are among the plans governing documents.

Amara further argues that even if a showing of detrimental reliance is required, "the proper standard is possible prejudice to an 'average plan participant,' not actual prejudice to each individual in the plan."

Lastly, Amara turns to CIGNA's attempt to compare reliance on an SPD to reliance on a syllabus in a Supreme Court decision. Amara rejects such a comparison, noting that the "Court does not distribute syllabi to every member of the public while retaining the full opinions for production only on written request. Nor are there legal requirements that syllabi be comprehensive or accurate, or even published at all."

SIGNIFICANCE

CIGNA warns of the economic effects of a ruling in Amara's favor. CIGNA argues that if participants were permitted "to recover based on an inconsistency between an SPD and the plan—regardless of whether they read the SPD (let alone relied on) the SPD—… the actuarial soundness of ERISA defined pension plans" could be imperiled. CIGNA states that, "[f]orcing trustees of a plan to pay benefits which are not part of the written terms of the program … potentially jeopardizes the pension rights of others *legitimately entitled to receive them."* (quoting *Cummings by Techmeier v. Briggs & Stratton Ret. Plan,* 797 F.2d 383 (7th Cir. 1986).)

If a standard of "likely harm" is adopted, CIGNA argues that "employers would be confronted with the prospect of crippling class-wide liability for any stray comment in an SPD that diverged from the terms of the plan, regardless of whether any employees actually altered their conduct based on the SPD. Such staggering liability could discourage employers from establishing pension plans and compel those employers with plans to terminate them."

In order to prevent such enormous costs, the plan administrator would feel compelled to adopt "lengthy and complicated SPDs in an effort to guard against any possible inconsistency in the plan." This would likely defeat ERISA's requirement that an SPD be written so as to be understood by the average participant.

In contrast, Amara focuses on the impact that a ruling against the plan participants would have on individual plan participants and on the legal system. Amara contends that requiring individual demonstrations of detrimental reliance is completely unworkable in cases that involve thousands of individuals: "If each of the 27,000 class members participated, individual hearings would consume *over 10 years* at a rate of 10 witnesses per day testifying before a Federal district judge (or a special master). Even if only 10 percent participated, the result would be 52 weeks of hearings, with tremendous expense and logistical burdens to have witnesses, including from out-of-state, lined up to testify one after the other." Amara argues that CIGNA's proposal "would bar any recovery not only by persons whose memories are not like video recordings, but also recoveries by adults who do not read at a high school or college level but learn by talking to co-workers who review benefit descriptions." Amara contends that "CIGNA's proposed detrimental reliance standard would do no more than sweep aside 'unwarranted' recoveries. Instead, it would sweep aside any recovery for tens of thousands of persons who were harmed by disclosures that CIGNA now concedes were 'totally inadequate.'"

In its amicus brief, AARP emphasizes that without accurate information, employees may "make myopic and suboptimal decisions regarding when to retire or how much to save for retirement." This can have a long-term devastating and emotionally shattering impact on the employees and their families. AARP stresses that it does not matter how the employees discover the information, whether it be from the SPD, other rank-and-file workers, or from CIGNA's employees who are expert benefits managers.

If the Court adopts CIGNA's position, employees are likely going to be harmed. Few participants can prove that they read a document a decade or more earlier. Moreover, if participants are required to prove individual reliance, few will be able to find an attorney who is willing to take on the case because a class action case will be precluded. The Pension Rights Center and others, writing in support of Amara's position, suggest a bright line rule as an alternative. Under this rule, participants would be awarded benefits according to the most participant-friendly document without the need for further proof.

The U.S. Department of Labor urges the Court to take a similar approach; "when the SPD clearly promises materially greater benefits than the more formal plan instruments, the SPD controls, unless the defendants show that the participant did not reasonably expect to receive the more favorable benefits." This rule is supported by the plan document rule, which requires fiduciaries to manage the plan in accordance with the plan documents.

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PREVIEW of United States Supreme Court Cases, pages 111–113.

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