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newsletter

A report to clients and friends of the Firm

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Editor's Overview

The Supreme Court is expected to rule in Spring 2011 in the case of *CIGNA Corp. v. Amara.* As the authors explain below, depending on the breadth of the Supreme Court's ruling, the decision could have widespread implications on the sustainability of a large variety of claims under ERISA that are premised on allegations of faulty communications.

As always, be sure to review the section on *Rulings, Filings and Settlements of Interest*.

CIGNA Corp. v. Amara: the "Likely Prejudice" Standard under the Microscope[1]

Contributed by Myron Rumeld & Nicole A. Eichberger

On November 30, 2010, the U.S. Supreme Court heard oral argument in *CIGNA Corp. v. Amara*, Case No. 09-804. Certiorari was granted to address the question of what showing of harm, if any, a participant must demonstrate in order to recover on a claim where the Summary Plan Description ("SPD") conflicts with the terms of the plan document. Depending on the breadth of the Supreme Court's ruling, the decision could have widespread implications on the sustainability of a large variety of claims under ERISA that are premised on allegations of faulty communications, including whether such claims can proceed as class actions.

At the root of the dispute is whether a participant who claims to have been victimized by a faulty plan communication: must demonstrate that he/she detrimentally relied on that communication; will be afforded relief based on a showing of "likely prejudice," a substantially less onerous standard that has been applied in various contexts in the Second Circuit; or need make no showing at all, based on the theory that a statutory violation automatically entitles the participant

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to relief. The determination of which standard to apply will not only impact the participant's entitlement to relief, but also may have a bearing on whether the participant can obtain relief for a class of similarly situated participants.

Factual Background

Plaintiff Janice C. Amara and the other plaintiffs (collectively "Plaintiffs") were, when the lawsuit was filed, current or former employees of defendant CIGNA Corp. ("CIGNA"). In 1998, CIGNA amended the CIGNA Pension Plan (the "Plan") from a traditional defined benefit formula to a cash balance formula. Under CIGNA's traditional defined benefit formula, employees earned benefits over time based on their service and salary and, upon retirement, received an annuity with their annual benefit payable for life. Following the amendment to the Plan, each participant was provided with a starting balance in his/her cash balance account, which was calculated by taking the frozen annual benefit earned under the prior defined benefit plan and discounting it into a lump sum amount using prescribed interest rate and mortality assumptions. Thereafter, participants earned annual service and salary credits plus quarterly interest credits. Because the starting balance in the cash balance account could be worth less than the value of the frozen defined benefit, the Plan provided that participants would receive the greater of their frozen defined benefit or their cash balance benefit. For many participants the result was that, for a period of time, known as the "wear-away" period, their benefits did not increase because their frozen benefit under the defined benefit plan remained greater than the benefit accrued under the cash balance plan.

Both before and following the Plan's conversion to a cash balance formula, CIGNA issued communications to participants regarding the cash balance formula. The disclosures included those that are required by statute, such as the ERISA § 204(h) notice of amendments that may reduce benefit accruals, the summary of material modification ("SMM") and SPDs, as well as annual benefit statements and, upon request, a copy of the Plan itself.

Procedural History

In 2001, Plaintiffs filed a class action lawsuit against CIGNA and the CIGNA Pension Plan (collectively "Defendants"), alleging that the conversion of the Plan to a cash balance formula discriminated on the basis of age and violated ERISA's nonforfeiture and anti-backloading rules. In addition, Plaintiffs alleged that the SPD was deficient for failing to properly communicate the wear-away effect. According to Plaintiffs, the SPD mistakenly led participants to believe that they would receive the full value of their frozen benefit under the defined benefit plan *plus* whatever new benefits were accrued under the cash balance plan. The Plaintiffs sought certification of a class of approximately 27,000 participants, which was later certified, and relief for the putative class under ERISA § 502(a)(1)(B), which permits a participant to sue to recover benefits due under the terms of the plan, and ERISA § 502(a)(3), which entitles participants to recover equitable relief for breaches of the Plan or ERISA, including deficient SPDs, fiduciary breaches for material misrepresentations, and/or equitable estoppel.

Following a bench trial, the district court concluded that the Plan's cash balance formula was not age discriminatory and did not violate ERISA's anti-backloading and non-forfeiture rules. However, the district court concluded that the Plan's

SPDs were deficient under ERISA because they failed to adequately disclose the "wear-away" phenomenon to participants. In so ruling, the district court determined that the Plaintiffs need not demonstrate on an individual basis that they were detrimentally harmed by the SPD deficiency, but rather that it was sufficient that they show that they were "likely harmed." The district court found this standard to be consistent with the "likely prejudice" standard applied by the Second Circuit in other instances of statutory or regulatory violations. *See*, *e.g.*, *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103 (2d Cir. 2003). The district court then held that the class was "likely harmed" by the deficient SPD, stating that the term "likely harmed" was construed broadly and that by the very nature of the purpose behind dissemination of an accurate SPD under ERISA satisfied the "likely harmed" standard. The court made no participant-by-participant showing of injury.

For relief, the district court awarded each participant the benefit that the SPD purported to offer: the frozen traditional defined benefit *plus* his cash balance benefits. It issued such relief under ERISA § 502(a)(1)(B), without determining whether the deficient SPD claim is itself a proper claim under Section 502(a)(1)(B) or 502(a)(3) of ERISA.

Defendants petitioned for certiorari from the U.S. Supreme Court on the issue of what showing of harm, if any, a participant must demonstrate in order to recover on a claim when the SPD conflicts with the terms of the plan document.[2]

On June 28, 2010, the U.S. Supreme Court granted Defendants' petition for certiorari as to the following issue: When a corporation's summary plan description and actual retirement benefit plan are inconsistent, is the proper standard for measuring harm a standard of "likely harm" rebuttable by the defendant after a showing of "harmless error," or must a plaintiff show "detrimental reliance" on the inconsistency.

Defendants' Arguments

In their brief, Defendants argued that no relief is available under Section 502(a)(1)(B) of ERISA because claims for benefits are governed by the terms of the plan, not the SPD. In the alternative, they argued that if relief is available under ERISA § 502(a)(1)(B), a plan participant must prove that he/she detrimentally relied on the conflicting SPD since otherwise a plan participant could receive windfall benefits without even having reviewed the defective SPD. Such a windfall, Defendants argued, is not contemplated by ERISA, which for other disclosure claims requires the plan participant to demonstrate an actual injury before he/she is entitled to recover. The policy behind this showing, Defendants argued, is to ensure that plan participants who are not injured do not drain plan assets at the expense of participants who actually suffered an injury. Defendants argued that a consistent "detrimental reliance" standard establishes uniformity for disclosure claims under ERISA § 502(a)(3) and furthers ERISA's

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[2] In their opposition to Defendants' petition for certiorari, Plaintiffs petitioned for certiorari on two questions: (1) whether CIGNA's challenge to the "likely harmed" standard is proper for appeal; and (2) whether, after a finding of misleading statements in the SMM and SPD, a district court is precluded from finding a violation of ERISA's disclosure requirements unless the district court conducts individual hearings into how each individual participant detrimentally relied on the misleading statements. The Supreme Court held Plaintiffs' petition in abeyance, pending decision as to Defendants' certiorari petition.

policy goal of creating a stable and sound benefit plan by protecting employers from damaging litigation costs.

With respect to ERISA § 502(a)(3), Defendants argued that drafting and modifying a SPD is a fiduciary function. As such, Defendants argued that a misleading SPD claim is akin to a breach of fiduciary duty for improper disclosures, which ordinarily required a showing of detrimental reliance.

Defendants concluded their argument by stating that if the Supreme Court applies a “likely harm” standard to grant relief to plan participants it would create strict liability for employers and plan administrators, opening the door for class-wide relief to participants who never even read the SPDs, let alone detrimentally relied on them. The prospects of such relief, Defendants argued, would cause employers to craft lengthy and complex SPDs in order to prevent possible inconsistencies with the plan and possible lawsuits against the employers, thereby defeating the purpose for creating SPDs in the first place.

Plaintiffs’ Arguments

Plaintiffs argued that ERISA § 502(a)(1)(B), and relief awarded thereunder, was appropriate for a deficient SPD claim since the SPD is a governing plan document that enables a plan participant to enforce his/her rights under the Plan. Thus, a plan participant can recover benefits under ERISA § 502(a)(1)(B) for promises made in a SPD. Relying on circuits that have held that the SPD prevails where it is in conflict with the plan document, Plaintiffs argued that individual reliance is not needed for a deficient SPD claim.

Plaintiffs then argued that even if a plan participant needed to show possible prejudice or likely harm, the standard to be applied should be an objective one, and should be that of a reasonable plan participant, rather than an individualized detrimental reliance standard. In support of this argument, Plaintiffs cited ERISA’s policy favoring adequate disclosures and rules governing the drafting of the SPD. Plaintiffs contended that a detrimental reliance standard would breach this policy by encouraging employers to disregard the statutory disclosure requirements.

Oral Argument

On November 30, 2010, the Supreme Court heard oral argument. Surprisingly, the Court spent a large portion of the time allotted questioning whether a deficient SPD claim is grounded in contract law and therefore proper under Section 502(a)(1)(B) of ERISA. As a result, there was little opportunity to discuss in any depth whether likely harm or some other showing of harm should apply in the event Plaintiffs were relegated to a claim for equitable relief under ERISA § 502(a)(3), and how the need to demonstrate harm could impact the availability of class-wide relief. One Justice suggested that a burden-shifting analysis should apply, whereby likely harm could be inferred from the facts and circumstances, but Defendants could rebut an inference of such harm through the presentation of additional evidence. Unfortunately, no one considered that this case may not be the best one to evaluate that standard since the district court had found that the Defendants had failed to avail themselves of the opportunity to offer such evidence.

With respect to the contract claim, several Justices ultimately communicated misgivings with the notion that the SPD should govern where the SPD and the plan document conflict, but only where doing so would favor the participant. The Court also observed that allowing such a claim to proceed could cause plans to draft very expansive SPDs, rather than the type of simple-to-read summaries contemplated by ERISA, so as to reduce the risk of class-wide liabilities based on a claim that the SPD failed to fully communicate what participants were entitled to know. Should the Supreme Court ultimately reject such a contractual claim, the ruling may call into question the continued viability of prior rulings in various states finding that the SPD automatically trumps the plan document when the two are in conflict.

Proskauer's Perspective

We would expect the Supreme Court's ruling in *CIGNA* to be significant even if limited to the relatively narrow issue of the standard to apply in claims where the SPD and plan document conflict. Indeed, a clear ruling on that issue could effectively overturn the existing law in a number of Circuits. The decision may have broader implications, however, if the Court signals that the standards to apply in these types of cases also should apply elsewhere, such as in fiduciary breach claims under ERISA § 502(a)(3) based on alleged misrepresentations or material omissions. It will have broader implications still, if, in response to the concerns expressed by the Defendants in their brief, the Court signals how the standard for obtaining relief impacts the availability of class-wide relief.

Unfortunately, in the little time devoted at the oral argument to the essential question of what standard of harm should apply, no one seemed to address head-on what we would view to be the essential issues: Even assuming that the plan breached its statutory disclosure obligations, and that many or all of the plan participants were confused about their benefits, should these circumstances alone entitle all the participants to receive benefits that were never intended? Should harm to all the participants be inferred — and therefore relief afforded — when the facts and circumstances may suggest that many or most of the participants would have done nothing different in their lives even if they had fully understood the consequences of the cash balance conversion? The Second Circuit's summary opinion affirming the district court's ruling left us wondering whether the panel ever grasped these issues. Hopefully, the Supreme Court will take a closer look.

Rulings, Filings and Settlements of Interest

- In *North Cypress Med. Ctr. Operating Co. v. MedSolutions Inc.*, No. 4:10-cv-2608 (S.D. Tex. Nov. 11, 2010), a district court held that a hospital lacked standing to sue a third-party claims administrator because the hospital's patients had not made an express and knowing assignment of their rights to assert ERISA fiduciary duty claims against the hospital.
- In *Simmons v. Pilgrim*, No. 2:09-CV-121, 2010 WL 4683745 (N.D. W.Va. Nov. 10, 2010), plaintiffs claimed that the Pilgrims Pride Retirement Savings Plan was improperly amended because the amendment procedure was defective and/or the amendments reduced employer matching contributions in violation of ERISA. The court dismissed the claims, without prejudice, concluding that

plaintiffs' allegations were akin to benefit claims under ERISA § 502(a)(1)(B), and exhaustion of administrative remedies was necessary to provide the court with a clear administrative record.

- Based on investigations by the Employee Benefits Security Administration, the Department of Labor filed twenty-four separate lawsuits on November 15, 2010 as part of its Employee Contributions Initiative. The Initiative seeks to recover specific funds that the DOL claims should have been contributed to employee benefit plans, and to deter other plan sponsors from delaying promised employer contributions. The suits target companies from across the country, seeking recovery of alleged delinquent or missing contributions ranging from several thousand dollars to $6.6 million. Information about each of the suits is available on the DOL's Web site at http://www.dol.gov/ebsa/newsroom/ECI/main.html.
- In *Dudenhoeffer v. Fifth Third Bancorp, et al.,* No. 08 Civ. 538 (S.D. Ohio Nov. 24, 2010), the court granted defendants' motion to dismiss plaintiffs' employer stock-drop lawsuit, which asserted, among other things, that defendants: (i) violated their duty of prudence by maintaining Fifth Third Bancorp stock as an investment option after it became imprudent to do so; (ii) breached their fiduciary duty by failing to provide complete and accurate information to plan participants about Fifth Third's financial condition; (iii) failed to monitor the persons managing and investing plan assets; and (iv) failed to correct, and participated in, various breaches of fiduciary duty. In so ruling, the court applied at the pleadings stage the presumption of prudence first recognized in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), and applied later in *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995). Relying on *Twombly* and *Iqbal*, the court stated that the complaint "only becomes plausible if there are sufficient facts alleged to conclude that 'a prudent fiduciary acting under similar circumstances would have made a different investment choice.'" The court concluded that plaintiffs could not overcome the presumption of prudence because they could not allege that Fifth Third was "in the type of dire financial predicament sufficient to establish a breach of fiduciary duty." Although the complaint alleged that the price of Fifth Third stock declined 75%, Fifth Third remained viable and its stock price subsequently rebounded substantially. With respect to plaintiffs' disclosure claim, the court held that the alleged misstatements were "made in the context of filing routine financial disclosures required under the federal securities laws and regulations" and were not "intentionally connect[ed] … to the Firth Third Stock Fund." Accordingly, the court concluded that the complaint failed to allege that the misstatements were made in an ERISA fiduciary capacity.
- In *Harris v. Koenig*, 2010 WL 4553537 (D.D.C. Nov. 12, 2010), a district court certified a class of approximately 30,000 retirement plan participants in an employer stock-drop action.
- In *Finkel v. Lite Tron Ltd.*, No. 09 Civ. 1253 (E.D.N.Y. Oct. 29, 2010), a multiemployer plan was permitted to seek delinquent contributions from the company's owner, in his individual capacity, where the owner was allegedly engaged in a fraudulent scheme to avoid paying contributions. The complaint alleged that the owner consistently underreported hours of union workers and

underpaid contributions on their behalf. In denying the owner's motion for summary judgment, the court stated that "[w]here both control and fraudulent conduct are established, an individual officer is liable for a corporation's ERISA violations 'even if the traditional conditions for piercing the corporate veil are not met.'" The court concluded that, in this case, the owner allegedly participated in a "sham transaction" in order to avoid paying the contractually required contributions.

> In *In re: YRC Worldwide, Inc. ERISA Litig.* No. 2:09-cv-02593-JWL-JPO (D. Kan. Nov. 29, 2010), former employees sought a jury trial in an action against their employer under ERISA. The employees argued that they were entitled to a jury trial under the Seventh Amendment because they sought "actual damages" for losses in value to the plan's assets that resulted from alleged fiduciary breaches. Further, the employees urged that under the Supreme Court's decision in *Great-West*, their claims were not for equitable restitution because they were not "seeking to disgorge from defendants particular funds" removed from the plan. Consistent with Supreme Court precedent, the court considered: (i) the nature of the action and (ii) the remedy sought. As to the first inquiry, the court recognized that ERISA claims for breaches of fiduciary duty have traditionally been decided by courts of equity, thus weighing against applying the Seventh Amendment. As for the second inquiry, the court rejected the employees' interpretation of *Great-West* because that case "did not involve the right to a jury trial under the Seventh Amendment"; rather, the Court considered whether an "insurer's claim was equitable and therefore authorized by ERISA § 502(a)(3)." Furthermore, in striking the jury demand, the court noted that even if *Great-West* did apply, the employee's monetary claim would still be "inextricably intertwined with equitable claims," requiring that it be "deemed equitable as well" under the Seventh Amendment.

> In *Vaughn v. Bay Envtl. Mgmt. Inc.*, No. 03 Civ. 5725 (N.D. Cal. Nov. 15, 2010), the court preliminarily approved a settlement between Bay Environmental Management Inc. and a class of its former employees, resolving the employees' claim that the trustees of the company's retirement plan violated their fiduciary duties under ERISA by imprudently investing retirement plan assets on behalf of participants. The settlement requires the company to pay $1.9 million to the settlement class.

Our ERISA Litigation Practice is a significant component of Proskauer's Employee Benefits, Executive Compensation & ERISA Litigation Practice Center. Led by Howard Shapiro and Myron Rumeld, the ERISA Litigation Practice defends complex and class action employee benefits litigation.

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