June 22, 2011

The U.S. Supreme Court in *CIGNA Corp. v. Amara*[1] has reshaped the remedies for an employer's breach of its ERISA fiduciary obligations in a way that likely will prove to be a mixed blessing for plan sponsors. The Court unanimously held that the remedy under ERISA Section 502(a)(1)(B) to enforce "the terms of the plan" is not available for inaccurate or misleading statements in a summary plan description ("SPD") or other communications about plan terms[2]. The decision concludes that summaries *about* plan terms are not themselves *part of* the plan and rejects the general approach adopted by many lower courts before *Amara* that would have enforced a statement in an SPD, if more favorable to a plan participant, as the enforcement of the terms of the plan[3]. In a common sense explanation, Justice Breyer suggests that had the Court ruled otherwise, employers likely would resort to drafting plan summaries "in the language of lawyers," which would defeat the fundamental purpose of the SPD: clear, simple communication.

However, employers and other fiduciaries are not shielded from liability when it comes to flawed plan communications. The Court remanded the case to the District Court to determine whether, as an alternative remedy, the plan participants in *Amara* may seek redress under ERISA Section 502(a)(3), a catch-all provision that allows participants to sue for "appropriate equitable relief." Writing for the majority in a 6-2 decision, Justice Breyer departed from prior Supreme Court decisions and significantly expanded the potential remedies available under Section 502(a)(3). Most notably, he suggested that even *monetary damages* might be available[4]. In addition, Justice Breyer suggested that in certain cases it may not be necessary for a participant to demonstrate that he or she had detrimentally relied on the deficient SPD (as some lower courts had required pre-*Amara* in order to enforce the SPD as the plan), in order to seek relief. At minimum, both the majority opinion and Justice Scalia's concurring opinion agreed that generally plan participants would need to show actual harm in an equitable relief claim where monetary damages are sought.

It will likely be several years before the full impact of the Amara decision develops, as lower courts are pushed by plaintiffs' attorneys to grant monetary relief under ERISA Section 502(a)(3). The opinion does not offer details on what kinds of actual harm a participant must prove. Nor is it clear whether the amount of compensation available under an equitable relief claim would be similar to what a participant would receive under the pre-*Amara* rule adopted by many lower courts of requiring enforcement of the SPD as if it were the plan. Finally, the opinion makes no mention of whether class action suits would be possible for equitable relief claims that may require individualized proof of monetary harm. However, in broadening the scope of remedies available under ERISA's equitable relief catch-all provision, one wonders whether the decision merely has changed the path a participant must take to achieve a result similar to that which is now foreclosed under ERISA Section 502(a)(1)(B). Old wine in new bottles?

For now, employers should consider the following practical steps in light of the *Amara* decision:

- **Be candid about changes in employee benefits**. The *Amara* case serves as a cautionary tale to employers that seek to avoid difficult communications about reductions in employee benefits. Communications should not downplay or omit to disclose material changes that may result in a reduction of benefits or other adverse changes.
- **SPDs can and should summarize**. The *Amara* decision emphasized that the SPD is meant to be brief and readable and is not intended to include every conceivable lawyerly caveat. This should encourage employers to issue SPDs and other plan communications that actually summarize, rather than restate, plan terms and changes. Note however that some plans—such as severance plans—often provide that the plan document also serves as its own SPD. For such a plan/SPD, the *Amara* ruling may not have much practical effect, and plans of this type should be reviewed to ensure that plan terms are complete and unambiguous.

- **Review plan communications and the procedures for their issuance**. Although *Amara* is helpful in confirming that SPDs are not binding contracts, an employer cannot use that conclusion as a shield against claims that misleading statements or material omissions resulted in harm to participants for which it may owe monetary compensation. Employers should continue to prioritize careful review of participant communications for ERISA compliance and accuracy and may wish to put more formal procedures in place to ensure this result.
- **Reconsider who has authority to make communications regarding the plan**. The majority opinion in *Amara* distinguished prior decisions that excluded monetary damages in an equitable relief claim, because those decisions dealt with defendants that, unlike CIGNA, were not acting as *fiduciaries* (such as a third party actuary). We do not believe that *Amara* will result in every inaccurate email or offhand comment by a representative of an employer creating an actionable claim for a breach of fiduciary duty. Companies should reexamine internal procedures and controls to ensure that only those persons who are specifically authorized are exercising discretionary authority over the administration of a plan.
- **Revisit welfare plans with "wrap" documents**. This is also a good time to make sure that there is an ERISA-compliant SPD for each ERISA plan. Some companies may believe that the certificate of coverage or summary of benefits provided by insurance companies for health and welfare plans are SPDs; however, these often fail to contain all of the information required by ERISA, and a supplementary document that "wraps around" such certificates or summaries is often necessary to constitute a compliant SPD.

If you have questions about this *Alert*, please contact one of the attorneys in the Compensation & Benefits Group listed above.

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NOTES

1 No. 09-804, 2011 U.S. LEXIS 3540 (U.S., May 16, 2011).

2 The dispute in *Amara* arose when CIGNA converted its defined benefit pension plan to a cash balance pension plan. The District Court found that CIGNA, as both plan sponsor and plan administrator, had violated several ERISA requirements by providing summary descriptions of the new cash balance pension plan that were significantly incomplete, inaccurate and misleading.

3 *See, e.g., Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d. 365, 378 (3d Cir. 2003) (noting that the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits "have all adopted similar views (though somewhat varying in scope, precise context, and extent) that if the SPD language differs from or conflicts with the plan language, it is the SPD language that will control").

4 The Supreme Court has previously held that equitable relief under ERISA Section 502(a)(3) may be available for misrepresentations by an employer that serves as a plan administrator, under the theory that the employer was acting in part in a fiduciary capacity. *See Verity Corp. v. Howe*, 516 U.S. 489 (1996). However, starting with *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the Court narrowly interpreted the phrase "appropriate equitable relief" to exclude compensatory money damages. *See also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

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