

Client Alert

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Supreme Court To Rule On Standard To Recover Benefits Under ERISA When Terms Conflict

The United States Supreme Court may finally resolve a conflict among the United States Circuit Courts of Appeal on the standard to be applied when a plan participant seeks recovery under an ERISA plan and the terms of a Summary Plan Description ("SPD") or Summary of Material Modifications ("SMM") conflict with the express terms of the plan. In June, the Supreme Court accepted the Petition for Writ of Certiorari filed by CIGNA Corporation and the CIGNA Pension Plan from the February 15, 2009 decision of the United States District Court for the District of Connecticut in *Amara v. CIGNA Corp.* and its subsequent affirmation by the United States Court of Appeals for the Second Circuit. This alert discusses the lower court's decision and the varying standards applied by the Courts of Appeals.

The Lower Court's Decision

The district court found that, while CIGNA's cash balance plan complied with ERISA, the descriptions of the cash balance conversion contained in CIGNA's SPD did not provide sufficient information to plan participants to enable them to understand the effect on their retirement benefits of the conversion from a traditional defined benefit plan to a cash balance plan. Specifically, the district court noted that CIGNA's SPD failed to disclose that participants might experience "wear away," a phenomenon which occurs when employees continue to work but earn no additional retirement benefits beyond those previously earned under the traditional defined benefit plan. The district court determined that, even if CIGNA did not have an affirmative duty to inform participants of the "wear away," CIGNA's SPD materially misled participants because it caused the participants to believe that they would continue to accrue benefits, when in fact they might cease earning benefits for years in the future. The terms of the SPD indicated that participants would continue to accrue retirement benefits, while the terms of the Plan did not allow certain participants to continue to accrue retirement benefits.

The district court rejected CIGNA's argument that participants must show individualized reliance or prejudice prior to a grant of relief. The Second Circuit affirmed, adopting the standard that "a plan participant or beneficiary [is entitled to relief if he or she] was likely to have been harmed as a result of a deficient SPD . . ." The district court further held that the participants in the CIGNA Plan were likely harmed because the participants were led by the SPD to believe that no "wear away" would occur. According to the court, the misleading nature of the SPD may have caused "likely harm" because it deprived participants of their ability to timely protest the cash balance conversion, leave CIGNA, or file a lawsuit.

CIGNA's Petition for Writ of Certiorari

In its Petition, CIGNA argued that the Second Circuit's affirmation of the "likely harm" standard conflicts with standards applied by other United States Courts of Appeal. CIGNA argued that six Courts of Appeal (the First, Fourth, Seventh, Eighth, Tenth and Eleventh) require participants to demonstrate individualized reliance or prejudice to gain relief because of a deficient SPD; in contrast, according to CIGNA, three other Courts of Appeal (the Third, Fifth and Sixth) do not require participants to show "likely harm," but instead apply a "strict liability standard" to adopt the more beneficial terms contained in the SPD. To date, only the Second Circuit has adopted the "likely harm" standard. This means that three different standards now are applied across the Circuits to determine the circumstances under which a participant may recover when the terms of an SPD conflict with the terms of an ERISA plan.

The Solicitor General, on behalf of the Department of Labor ("DOL"), submitted an *amicus curiae* brief regarding CIGNA's Petition. The DOL urged the Supreme Court to deny CIGNA's Petition because the district court appropriately required participants to demonstrate that they were prejudiced by CIGNA's deficient SPD. The DOL argued that the district court's approach accounts for the difficulty participants would encounter if they were required to show individual detrimental reliance on a defective SPD years later, or if, for example, a beneficiary had to prove that a deceased participant had actually read an SPD. According to the DOL, all eleven Courts of Appeal have held that an SPD controls when its terms materially conflict with plan terms, albeit requiring different additional demonstrations, or no demonstration at all, of reliance or prejudice. Arguing that the facts of this case differ from the decisions requiring a showing of reliance or prejudice, the DOL contended that CIGNA's intentional misrepresentations in its SPD rendered this case an inappropriate vehicle for determining what uniform standard regarding reliance and prejudice should be adopted.

The "Individualized Reliance or Prejudice" Standard

The "individualized reliance or prejudice" standard requires that a plan participant make a showing that he or she either relied upon or was prejudiced by the terms in an SPD or SMM that conflict with the terms contained in an ERISA plan. For example, the First Circuit addressed the issue of reliance in *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519 (1st Cir. 1988). There, the terms of the SPD suggested that cash distributions would be made based upon the value of stock on December 31, 1983, while the terms of the plan suggested that distributions would be made as soon as practicable after the end of the year based on the value of the stock at the time of the distribution. The calculation of the value of the stock at the time of distribution, instead of December 31, 1983, caused participants to receive a lesser cash distribution. The court noted that it might be argued that the participants still should recover the cash value of the stock based on the December 31, 1983 price because they reasonably relied on the SPD. However, the court found that the participants chose to receive the cash value of the stock for reasons not related to the amount that would be distributed as cash instead of stock. Because there was no reasonable reliance on the SPD by the participants, the terms of the SPD could not be used as a basis for recovery.

Similarly, the Eighth Circuit requires a showing of detrimental reliance before a participant can recover for any financial loss and has specifically rejected the “likely harm” standard embraced by the Second Circuit in *Amara*. In *Greeley v. Fairview Health Services*, 479 F.3d 612 (8th Cir. 2007), Fairview provided an SPD to employees stating that disability benefits were available until age 67. However, the terms of the plan itself, which was not distributed to employees, provided only disability benefits until age 65. Greeley ceased working as a pathologist and began receiving disability benefits in 1999. In response to a request from Greeley, the plan informed him that disability benefits would cease when he turned 65. Greeley’s attorney wrote to Fairview for assurances that Greeley would receive disability benefits until age 67. Fairview did not respond and Greeley filed a lawsuit when Fairview ceased paying disability benefits to him. The district court applied a “likely harm” standard and found that Greeley was likely prejudiced by the SPD. However, the Eighth Circuit rejected the application of the “likely harm” standard and found that, in order for Greeley to recover, he had to demonstrate that he “took action or failed to take action” which he would not otherwise have taken, because of the SPD, and that he suffered harm as a result. Because Greeley testified that his medical condition caused him to go on disability, the court found that the SPD itself did not cause Greeley to change any course of action.

The United States Courts of Appeal for the Fourth, Seventh, Tenth, and Eleventh Circuits all require a participant to make an individualized showing of reliance or prejudice. Absent such a showing, a participant may not recover despite suffering a financial detriment because of inconsistencies between the terms of an SPD or SMM and the terms of an ERISA plan.

The “Strict Liability” Standard

Three Courts of Appeal, namely, the Third, Fourth, and Fifth Circuits, do not require participants to demonstrate “individualized reliance or prejudice.” Instead, these Courts will strictly enforce the terms of an SPD when such terms conflict with an ERISA plan and grant an employee vested benefits. For example, the Third Circuit has unequivocally stated that “a plan participant who seeks to claim plan benefits on the basis of a conflict between an SPD and a plan document need not plead reliance on the SPD.” *Burstein, M.D. v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation*, 334 F.3d 365, 380 (3rd Cir. 2003). In that case, an SPD provided that a participant would become fully vested regardless of years of service while the plan provided that benefits would be non-forfeitable *to the extent funded* upon termination of the plan. The district court found that the participant could not recover under the terms of the SPD because the plan did not provide the right to benefits. However, the Third Circuit reversed, finding that the SPD superseded and modified the terms of the plan. Because the SPD changed the plan terms, no showing of reliance or prejudice was necessary.

Similarly, in *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453 (5th Cir. 2007), an SPD provided disability benefits after five years of service and the plan provided disability benefits after ten years of service. The court held that the SPD controlled and was binding. Following the reasoning in *Burstein* discussed above, the Fifth Circuit held that, when an SPD grants vested benefits to a participant, the participant need not show reliance or prejudice in order to recover such benefits.

Conflict within the Ninth Circuit

District courts within the Ninth Circuit have applied either the “individualized reliance or prejudice” standard or the “strict liability” standard. For example, in *Skinner v. Northrop Grumman Retirement Plan B*, No. 07-3923, 2010 U.S. Dist. LEXIS 6591 (C.D. Cal. January 26, 2010), the Central District of California held that a participant must show reasonable reliance in order to recover when the terms of an SPD conflict with the terms of an ERISA plan. In contrast, the Western District of Washington held that reasonable reliance was not necessary for a participant to recover because the terms of an SPD supersede the terms of an ERISA plan. *Goldiner v. Datex-Ohmeda Cash Balance Plan*, No. C07-2081, 2010 U.S. Dist. LEXIS 38644 (W.D. Wash. March 31, 2010).

Conclusion

While the granting of CIGNA’s Petition for Writ of Certiorari has no immediate effect on companies or plans, it suggests that the Supreme Court will resolve the current conflict and set a uniform standard to be applied where a participant or beneficiary alleges that an SPD is deficient or promises vested benefits which conflict with the terms of an ERISA plan. Until the Supreme Court issues its decision, it will remain uncertain which standard ultimately will apply.

In the meantime, employers may continue to assert a defense in a majority of United States Courts of Appeal where SPDs or SMMs allegedly conflict with plan terms, but where participants are unable to demonstrate significant reliance or possible prejudice.

Given the Supreme Court’s acceptance of CIGNA’s Petition, employers and plans should consider:

- Staying litigation concerning defective SPDs or SMMs currently pending in the Second, Third, Fifth and Sixth Circuits, which apply a standard deferential to participants.
- Moving forward with litigation concerning defective SPDs or SMMs currently pending in the First, Fourth, Seventh, Eighth, Tenth and Eleventh Circuits, which apply a standard deferential to employers.
- Ensuring that all SPDs and SMMs accurately describe the benefits under the terms of the operative plan and in a manner capable of being understood by the plan participants and beneficiaries.

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