ERISA § 502(a)(1)-(3), 29 USC § 1132(a) (1)-(3)

Persons empowered to bring a civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) 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;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief
(i) to redress such violations or
(ii) to enforce any provisions of this subchapter or the terms of the plan

ERISA § 409(a), 29 U.S. Code § 1109(a)

Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

Elements of "Amara" Equitable Remedies

A. Equitable Estoppel

1. One party's misrepresentation of material fact that is contrary to a later-asserted position;

2. Reliance by other party on the misrepresentation;

3. Change in position detrimental to the party claiming estoppel that is caused by the representation.

(Supreme Court in Amara: "when equity courts used the remedy of *estoppel*, they insisted upon a showing akin to detrimental reliance, *i.e.*, that the defendant's statement "in truth, influenced the conduct of" the plaintiff, causing "prejudic[e]." Eaton §61, at 175; see 3 Pomeroy §805. Accordingly, when a court exercises its authority under §502(a)(3) to impose a remedy equivalent to estoppel, a showing of detrimental reliance must be made.")

(Last two elements are often combined and referred to as detrimental reliance; estoppel is considered a "defensive remedy," but can nevertheless be the basis of a lawsuit. Note that the separate doctrine of promissory estoppel, which does not require a misrepresentation of fact but does require change in position, is a contractual rather than an equitable remedy and is not available under ERISA.)

B. Equitable Surcharge

1. Breach by a trustee (fiduciary); and

2. Breach either causes actual harm to trust beneficiary that can be remedied through "surcharge;" or results in trustee's unjust enrichment.

(Supreme Court in Amara: "Nor did equity courts insist upon a showing of detrimental reliance in cases where they ordered "surcharge." Rather, they simply ordered a trust or beneficiary made whole following a trustee's breach of trust. In such instances equity courts would "mold the relief to protect the rights of the beneficiary according to the situation involved." Bogert §861, at 4. This flexible approach belies a strict requirement of "detrimental reliance."")

INSIDECOMPENSATION

DEVELOPMENTS IN EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION
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Amara Decision Affirms Broad Equitable Remedy for Inaccurate SPD

By Jason Levy on January 28th, 2015

What happens when a plan participant seeks benefits that he or she claims are set forth in a summary plan description ("SPD") but are found nowhere in the plan itself? On one level, the Supreme Court in *Cigna Corp v. Amara* answered this question decisively: SPDs and other written disclosures about the plan do not constitute terms of the plan and cannot modify the plan's terms. Accordingly, participants cannot claim under ERISA Section 502(a)(1)(B) that they are entitled to benefits under the plan based on statements that appear only in the SPD.

However, the Supreme Court also stated that a participant could obtain "appropriate equitable relief" under ERISA Section 502(a)(3) for statutory disclosure violations. The Supreme Court identified three possible equitable remedies: reformation, estoppel, and surcharge. Although the Supreme Court made clear that the traditional requirements in equity for obtaining any such relief must be satisfied, it left to the district court the task of determining when such remedies are appropriate.

Employers anxiously awaited the decisions on remand in *Amara*, which would determine the scope of any equitable relief for the inaccurate disclosures in the SPD. The district court found on remand that the employer had intentionally misrepresented the effect on participants' benefits when it converted a traditional pension plan to a cash balance plan, and that the employer's conduct constituted fraud. In these circumstances, the district court concluded, class-wide reformation of the CIGNA plan was an appropriate equitable remedy. The reformed plan provided all participants with the benefits they reasonably believed they would receive, based on the disclosures in the SPD.

The Second Circuit recently released its opinion affirming the district court's decision on remand. For plan sponsors and administrators, this decision offers several takeaways:

1. ***Fraudulent statements in statutory disclosures can support reformation of plan documents.***

This decision confirms that if communications to a broad array of participants, such as in an SPD, include intentionally misleading statements about changes to plan benefits, the misstatements can result in reformation of the plan for all participants. In *Amara*, the Second Circuit held that reformation was appropriate because the plan participants established by clear and convincing evidence (i) that the employer committed fraud and (ii) that the fraud reasonably caused plaintiffs to be mistaken about the terms of the pension plan.

The Second Circuit cited several instances where the employer materially misrepresented the terms of CIGNA's new pension plan and actively prevented employees from learning the truth about the plan. For example, an SPD describing the new plan informed employees that "your benefit will grow steadily throughout your career," while

at the same time CIGNA concealed the possibility of "wear away" (a period of time when a participant does not accrue additional benefits) under the new plan.

The Second Circuit held that the employer's uniform misrepresentations about the plan amendment and efforts to conceal the amendment's effect supported the conclusion that all participants were uniformly mistaken about the terms of the plan and thus entitled to class-wide reformation.

2. ***The extent of misstatements sufficient to give rise to reformation remains an open question.***

The Second Circuit acknowledged, in dicta, that participants are not entitled to reformation any time a plan communication contains an error. The factual findings of fraud made it unnecessary for the Second Circuit to identify the exact circumstances in which a misstatement is sufficiently significant to support a reformation claim.

As noted above, the district court had found several instances where CIGNA misled participants and prevented them from obtaining information about the material differences between the old and new benefit formulas. Plan sponsors and administrators responding to future class complaints seeking reformation might successfully confine the *Amara* decision to its facts, and might establish that reformation is available only where there are similar evidentiary findings of intentional misrepresentation or of self-dealing.

3. ***Clearly and accurately disclosing negative effects of a plan change is the surest means to avoid a reformation claim.***

The Second Circuit's *Amara* decision reinforces the need accurately to describe changes in plan terms that might result in a reduction in the benefits that a participant might reasonably expect a plan to provide. We expect that this decision will encourage participants to continue to file lawsuits seeking equitable relief based on the Supreme Court's decision in *Amara*. The best way to protect against such claims is accurately to disclose negative as well as positive effects of changes to plan terms.

Covington & Burling LLP
One CityCenter, 850 Tenth Street
| Washington, DC 20001-4956 | Phone: 202.662.6000 | Fax: 202.662.6291