ERISA Litigation

Impact of *Cigna v. Amara* and Other Recent Cases

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1

CIGNA Corp v. Amara
131 S. Ct. 1866 (May 16, 2011)

What happens when the summary plan description (SPD) promises more than the underlying plan documents?

What happened below in Amara?

- After lengthy trial, district court held CIGNA violated ERISA through intentional misrepresentations in SPD (and elsewhere) and granted benefits based on what SPD promised
- Second Circuit affirmed and said that individual members of plaintiff class were likely harmed by the misrepresentations

3

What was at issue in the Supreme Court in Amara?

- What kind of relief is available to class of employees where SPD misled them about the benefits they would receive when plan switched from traditional DB plan to a cash balance plan?
- More specifically, what is the appropriate legal standard for determining whether members of employee class were injured?

4

What did the parties argue in Amara?

- The plaintiffs and amici (including the government) argued that SPD is governing plan document and plan administrator was required to follow it over less favorable terms in other plan documents that employees generally don't see. Likely harm standard was correct
- CIGNA argued that SPD is not a plan document and so cannot bring an action for benefits based on the SPD but can only bring an action for equitable relief, which doesn't include money, and that standard of harm is detrimental reliance

5

The surprise holding in Amara

- Court held that an SPD is not a governing plan document and so plaintiffs could not sue for benefits based on terms of SPD
- Stated that ERISA's equitable remedy provision could potentially get the district court to the same remedy, without a showing of detrimental reliance through equitable estoppel, reformation or surcharge
  - Acknowledged for the first time that make-whole monetary remedy (surcharge) is an available remedy against a breaching fiduciary

6

A note about surcharge

- Prior to Amara DOL repeatedly argues and consistently loses surcharge argument
- Courts felt remedy was foreclosed by ***Mertens v. Hewitt Assocs.***, 508 U.S. 248 (1993) and ***Great-West v. Knudson***, 534 U.S. 204 (2002)
- ***Aetna v. Davila***, 542 U.S. 2000 (2005) – Ginsberg and Breyer note DOL's argument in a concurrence
- ***LaRue v. Dewolff, Boberg & Assocs.,*** 552 U.S. 248 (2008) – S. Ct. grants cert. on surcharge issue but finds it unnecessary to resolve
- ***Amschwand v. Spherion***, 505 F.3d 342 (5th Cir. 2007) – Supreme Court denies cert. despite government brief making the argument ultimately endorsed in Amara.

7

THE REACH OF AMARA

- PLAN DOCUMENTS
  - LITIGATION
  - COMPLIANCE
- REMEDIES
- IMPORTANCE OF PLEADINGS

8

Amara's implications for plan documents

- ***Skinner v. Northrop Grumman Retirement Plan B*** (pending in 9th Cir.) – although primarily litigated as a claim for benefits, plaintiffs asserted and are now relying on claims for equitable relief in the form of surcharge and reformation on grounds of mistake under 502(a)(3)
  - Where SPD is misleading, reformation might get you right back to a suit for benefits under the terms of the plan

9

Amara's implications for remedies

- Individual monetary liability (surcharge) for fiduciaries who breach duties, including through faulty SPDs
- Surcharge remedy available outside pension plan context?
  - ***McCravy v. MetLife*** (pending on rehearing in 4th Cir.): life insurance plan
  - ***Sanborn-Alder v. CIGNA*** (settled in 5th Cir.): life insurance case much like ***Amschwand***
  - ***Kenseth v. Dean Health Plans*** (pending in 7th Cir.): health care plan

10

Amara's implications for pleadings

- How should participants plead their claims?
- Courts are still evaluating how *Amara* and *Varity v. Howe* should be evaluated.
- If the participant has a claim under the plan, no claim under 502(a)(3) will proceed

11

Amara's implications for pleadings

- *See* ***Wright v. Metro. Life Ins. Co.,*** 618 F.Supp.2d 43, 55 (D.D.C.2009) (ruling that "a breach of fiduciary duty claim cannot stand where a plaintiff has an adequate remedy through a claim for benefits under § 1132(a)(1)(B)"); ***Crummett v. Metro. Life Ins. Co.***, 2007 WL 2071704, at *3 (D.D.C. July 16, 2007) (concluding "with little hesitancy that [plaintiff's] remedies pursuant to subsection (1)(B) are adequate and that her fiduciary-duty claim must be dismissed"); ***Hurley v. Life Ins. Co. of N. Am.,*** 2005 U.S. Dist. LEXIS 43038, at *32 (D.D.C. July 7, 2005) (concluding that "the claim for ERISA breach of fiduciary duty [under § 1132(a)(2)] is preempted by the existence of a valid claim in Count I for denial of benefits").

12

Amara's implications for pleadings

- After Amara, many courts continue to find that if there is an adequate remedy under 502(a)(1)(B), a claim for breach of fiduciary duty cannot proceed under 502(a)(3), but some district courts are recognizing that participants can plead in the alternative.

13

Amara's implications for pleadings

- ***Clark v. Feder, Semo & Bard, P.C****., 808 F. Supp. 2d 219* (D.D.C. 2011)
- ***Cypress v. Principal Life Ins. Co.***, 2012 WL 434043 (S.D. Tex. Feb. 9, 2012)
  - At the pleading stage, both 502(a)(1)(B) and 502(a)(3) can in the alternative.

14

Amara's implications for plan documents

- ***Tetreault v. Reliance Standard Life Ins. Co.***, CIV.A. 10-11420-JLT, 2011 WL 7099961 (D. Mass. Nov. 28, 2011) *report and recommendation adopted,* CIV.A. 10-11420-JLT, 2012 WL 245233 (D. Mass. Jan. 25, 2012)(The instant case raises a question of law: whether the appeal procedures must be included in the written Plan document, and not just the SPD, to be enforceable. Therefore, the decision is one for the court to make, and the administrator's legal conclusion is not entitled to any deference.)

15

Amara's implications for plan documents

- ***Merigan v. Liberty Life Assur. Co. of Boston***, CIV.A. 2009-11087, 2011 WL 5974455 (D. Mass. Nov. 30, 2011), reconsideration denied (Dec. 9, 2011)(Considering *CIGNA v. Amara*, where SPD and LTD policy were separate documents and the LTD did not contain time limit within which to file an appeal, insurer's refusal to consider appeal as untimely was not consistent with the plan document).

16

HOT TOPICS

FIDUCIARY LITIGATION:
EMPLOYER STOCK INVESTMENTS
FIDUCIARY EXCEPTION
INTERNAL COMPLAINTS
PROPER DEFENDANTS
NEW FEE REGULATIONS

Moench v. Robertson 62 F.3d 553 (3d Cir. 1995)

- "[A]n ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision."
- "However, the plaintiff may overcome that presumption by establishing that the fiduciary abused its discretion by investing in employer securities."
- To rebut "the plaintiff may introduce evidence that owing to circumstances not known to settlor and not anticipated by hi, [the investment] would defeat or substantially impair the accomplishment of the purposes of the trust."
- Edgar v. Avaya, 503 F.3d 340 (3d Cir. 2007) – Applies presumption under "dire situation" standard on a motion to dismiss

18 18

Adopting the Presumption

- ***Kuper v. Iovenko***, 66 F.3d 1447 (6th Cir. 1995) To rebut must show "that a prudent fiduciary acting in like circumstances would have made a different investment decision"
- ***Kirschbaum v. Reliant Energy***, 526 F.3d 253(5th Cir. 2008) "It will not be enough for plaintiffs to prove that the company stock was not a 'prudent investment;'" must plead and show "that reasonable fiduciaries would have considered themselves bound to divest."
- ***Quan v. CSC*, 623 F.3d 870** (9th Cir. 2010) Presumption not rebutted where "[t]here is no indication that [the employer]'s viability as a going concern was threatened nor that [its] stock was in danger of becoming essentially worthless"

19
19

Rejecting the Presumption

- ***DiFelice v. U.S. Airways***, 497 F.3d 410 (4th Cir. 2007) Stating in dicta that no such presumption applies
- ***Bunch v. W.R. Grace & Co.***, 555 F.3d 1 (1st Cir. 2009) Presumption does not apply where participants have sued fiduciaries based on their decision to sell employer stock

20
20

Current Litigation: The Second Circuit Adopts the Presumption

- ***Gray v. Citigroup****, 662 F.3d 128 (2d Cir. 2011) – participants sued fiduciaries for loss of billions of dollars in undisclosed subprime mortgage related investments with resulting huge loss to value of Citigroup stock fund in 401(k) plan*
- ***Gearren v. McGraw-Hill***, 660 F.3d 605 (2d Cir. 2011) – 401(k) plan losses stemming from subsidiary, Standard & Poors' actions in knowingly and systematically overstating the value of mortgage-backed securities.

21

Citigroup and *Gearren* decisions

- The Second Circuit affirms the dismissal of both cases on the pleadings and adopts a presumption of prudence
- Not subject to ordinary prudence review
- Presumption applies even where terms of the plan do not require but merely permit investment in employer stock, but judicial scrutiny increases with degree of discretion granted
- Applies at pleadings stage to allow dismissal where allegations not sufficient "to establish that a plan fiduciary has abused his discretion"
- To overcome, need not show "verge of collapse," but must show "dire situation" unforeseeable by settlor

Citigroup and *Gearren*, cont.

- Presumption not overcome despite:
  - Fiduciaries alleged awareness of impending collapse of subprime market
  - Foreseeable loss of tens of billions of dollars in company's value
  - Allegations that Citigroup stock's price was inflated during relevant period because public was mislead
- Also held no duty to disclose the truth about the stock
- Lengthy and forceful dissent by Judge Straub
  - Adoption of presumption is unwarranted and standard not meaningfully defined
  - Allows huge losses from imprudence to go unremedied
  - Fiduciary duties encompass duty to disclose
- Second Circuit denies rehearing on February 23, 2012

The Sixth Circuit Limits the Presumption

- ***Pfeil v. State Street***, 2012 WL 555481 (6th Cir. Feb. 22, 2012) – Participants in 401(k) plan claimed that State Street breached its fiduciary duties by failing to eliminate GM stock investments until worthless
  - Holds allegations sufficient to overcome Kuper presumption because terms of plans required State Street to divest if viability in question
  - Could have stopped there but goes on to hold that Kuper creates an evidentiary and not a pleading standard and so not applicable at the pleading stage

Pfeil, cont.

- Rejects Second and Third Circuits' application of presumption at pleadings stage and sister circuits' application of "dire situation" or "impending collapse" standard for rebutting presumption
- Standard is whether, analyzed under an abuse of discretion standard, a prudent fiduciary acting in like circumstances would have made a different investment decision
- Also held that ERISA section 404(c) did not shield State Street from liability

25

Where the presumption stands

- Second and Third Circuits say presumption applies at motion to dismiss stage, Sixth says it does not
- Second and Third Circuit apply a "dire situation" test, Fifth and Ninth Circuits apply a "verge of collapse" standard, Sixth Circuit simply looks, under an abuse of discretion standard, to what a prudent fiduciary acting under like circumstances would do, while Fourth Circuit, albeit in dicta, has said no presumption applies at all
- The "dire situation" standard is being tested in a case involving investment in Lehman Brothers stock by its 401(k) plan
- The conflicts may well be resolved by Supreme Court; losing parties in both Second and Sixth Circuit cases may petition for cert.

26
26

Attorney-Client Privilege: The fiduciary exception

- What is the exception?
  - A common law rule recognizing that trust fiduciaries cannot assert the attorney-client privilege against trust beneficiaries on whose behalf those communications and documents were made

27

Is the fiduciary exception applicable in the ERISA fiduciary context?

- ***Solis v. The Food Employers Labor Relations Association***, 2011 WL 1663597 (4th Cir. May 4, 2011) – holding that fiduciary exception extends to communications between an ERISA trustee and a plan attorney regarding plan administration and that the Secretary may assert the exception

28

Internal Complaints Under ERISA's Whistleblower Provision

- ERISA section 510 prohibits adverse action against person who "has given information or has testified or is about to testify in any inquiry or proceeding" related to ERISA
- ***George v. Junior Achievement*** (7th Cir.) – question is whether this protects an employee who raises unsolicited complaints to management or the Department of Labor
  - 5th and 9th Circuits say that such complaints are covered; 3d and 4th say not covered; 2d says internal complaints are covered when solicited
  - *Kasten v. Saint-Gobain*, 131 S. Ct. 1325 (2011) FLSA whistleblower language "filed a complaint" broadly read to cover internal, oral complaints

29

Proper Defendants in a Claim for Benefits

- ***Cyr v. Reliance Standard Life Ins. Co.***, 642 F.3d 1202 (9th Cir. 2011) (en banc) – benefits suit against life insurance company that funded and decided and paid claims
  - Ninth Circuit reversed its prior precedent that a claimant could only sue plan or plan administrator
  - Agreed with plaintiff and Secretary that 502(a)(1)(B) does not say who is a proper defendant in a suit for benefits or limit the universe of proper defendants
  - Common sense decision recognizing that plan administrator might, as here, have no power to decide claims so it wouldn't make sense to sue that entity.

30

New Fee Disclosure Regulations

- New fiduciary level fee disclosure regulation, 77 Fed. Reg. 23 (Feb. 3, 2012), effective July 1, 2012
  - New transparency to process of selecting and monitoring plan service providers
  - Comprehensive disclosure regime: fiduciaries must obtain and service providers must provide specific information concerning services, fees and (potential) conflicts so that fiduciaries can make informed decisions about reasonableness of fees for plan services and decide whether conflicts may effect quality of those services
  - Direct and indirect compensation must be disclosed
  - Covers DB and DC plans (but not SEPs, simple retirements accounts or IRAs) and not welfare plans, but DOL is reviewing whether to impose similar requirements with regard to welfare plans
  - Enforced through excise tax on service providers who do not provide the required information (initial 15% tax on amount involved followed by 100% tax if PT is not corrected during taxable period
  - Applies to new and existing contracts

31

New Fee Disclosure Regulations

- New Participant Disclosure Regulation for participant directed plans, 76 Fed. Reg.178 (July 19, 2011)
  - Fiduciary duty of plan administrator or delegee to make regular and periodic disclosure so that participants have sufficient information to make informed decisions about the management of their accounts
  - Requires disclosures about investment instructions, investment alternatives, identity of investment managers, brokerage windows, explanation and dollar amount of fees for general plan administrative expenses, explanation and dollar amount of individually charged fees, certain benchmark and performance data for directed investment accounts
  - Requires a chart or similar format to show comparison between investment options
  - First disclosures required 60 days after the July 1 effective date of the fiduciary disclosure regulations

32