Navigating ERISA Misrepresentation Remedies in the Post-Amara World

Steven L. Severson
Thomas W. Carroll
Misrepresentations—
A Frequent Source of Litigation Under ERISA

► Various fact scenarios—but all arise from:
  ► An affirmative misstatement or an omission;
  ► Which is either intentional or innocent (negligent);
  ► Which is about plan benefits or plan changes; and
  ► Which involves a situation in which the plan itself does not provide the benefits sought or a participant is no longer eligible for benefits due to a misrepresentation by the employer regarding coverage.
The Law Before *Cigna v. Amara*

**Varying Standards of Harm**

- **Highest:** Detrimental reliance
- **Intermediate:** Likely prejudice (applies a rebuttable presumption)
- **Lowest:** No showing of harm required
The Law Before *Cigna v. Amara*

► What law applies?
  ► State law claims preempted

► Claims for intentional affirmative misrepresentation may be brought under section 502(a)(3) (*Varity Corp. v. Howe* (U.S. 1996))
  ► Cannot be brought as a "disguised" claim for benefits.
The Law Before *Cigna v. Amara*

- **ERISA Common Law**
  - Many courts recognize "equitable estoppel" claims
  - Varying tests apply
  - Example: *Bloemker v. Laborers' Local 265 Pension Fund* (6th Cir. 2010)
    - Estoppel applied even where plan terms were unambiguous
  - Must show:
    - Written affirmative misrepresentation
    - Detrimental reliance
    - Extraordinary circumstances
The Decision

Cigna v. Amara – The Facts

► Plaintiffs represented a class of 25,000 employees of Cigna. Plaintiffs alleged that CIGNA did not properly inform them of their benefits under a new pension plan.

► Cigna had previously offered a defined-benefit pension plan with a lifetime annuity.
On January 1, 1998, Cigna switched its employees to a new cash-balance individual account plan. The new retirement plan provided employees either a lump-sum payout or an annuity purchased with their lump-sum account.

- Cigna contributed a percentage of employee salary, depending upon age, length of service, and other factors of the employee.
- The initial contribution equaled the participants’ previous benefit, discounted to present value back from the employee's future retirement date.
- Accounts earned compound interest.

Cigna promised that employees would receive the greater of A or B.
The District Court ruled for Plaintiffs and found that Cigna misrepresented the plan to the employees and violated its duty under ERISA §§ 204(h), 102(a), and 104(b) by:

- Claiming that the new plan would not result in a cost savings to Cigna, when Cigna saved approximately $10 million annually; and
- Claiming that employees would not be harmed by the change. Employees were harmed because:
  - No early retirement option or accounting for that option in the new plan;
  - Starting lump sum was discounted to reflect a survivor payout; and
  - Risk of changing interest rates was shifted to the employees.
REMEDY: The District Court reformed the plan so that a participant's benefit under the new plan would be A PLUS B.

- The District Court found authority for this remedy under section 502(a)(1)(B).
- The District Court found a presumption of "likely harm" to Plaintiffs.

The Second Circuit Affirmed.
Cigna v. Amara – The Supreme Court

Issue: Whether a showing of *likely harm* is sufficient to entitle plan participants to recover benefits based on faulty disclosures.

Holdings:

- Section 502(a)(1)(B) does not allow a district court to reform the terms of a plan.
- The Summary Plan Description (SPD) cannot be enforced as the plan terms.

The Court also, in dicta, described equitable remedies available under section 502(a)(3):

- Estoppel
- Reformation
- Surcharge
Cigna v. Amara – Equitable Remedies

► Estoppel

► Operates to place the person in the same position as if the representations been true.

► Plaintiff's Burden: Must prove detrimental reliance – that is, that defendant's misrepresentation influenced the conduct of the plaintiff and caused prejudice.

► Reformation

► Reform the plan to reflect the understanding of the parties (or beneficiaries as will likely be the case).

► Plaintiff's Burden: Must prove fraud, suppression, omission, or insertion of terms that materially affected the substance of the contract. Plaintiff can be negligent for not realizing their mistake, but conduct cannot fall below reasonably prudent standard.
Cigna v. Amara – Equitable Remedies

► Fiduciary Surcharge

► Only available against a plan fiduciary, not another party associated with the plan.

► Monetary compensation provided to plaintiff to remedy breach of duty by a fiduciary.

► Plaintiff's Burden: Actual harm suffered by the plaintiff and proven by a preponderance of the evidence.
  ▶ Can be detrimental reliance or loss of a right protected by ERISA or trust-law antecedents.
  ▶ Court notes that absence of "informal workplace discussions" because of an omission/misrepresentation can suffice for employee reliance.
On remand the district court denied a motion by Cigna to decertify the class and again ordered the plaintiffs to provide a) the annuity under the previous plan PLUS b) the new lump sum benefit. But this time the court did so as a section 502(a)(3) reformation remedy.

The Second Circuit affirmed the decision of the district court, *Amara v. Cigna Corp.*, (2d Cir. 2014).

Both parties disagreed with the district court's remedy on appeal:

- The Plaintiffs wanted the DB pension plan restored
- Cigna wanted the current plan to continue without any changes
Post-Amara Themes

There are several themes playing out in post-Amara ERISA litigation:

► **SPD and Plan Docs:** In *Amara*, the Supreme Court held that a SPD does not constitute the terms of the plan. This holding has been adapted to fit different SPD and Plan situations.

► **Remanded in Light of Amara:** Many cases have been remanded back to district courts in light of the Supreme Court's decision.

► **Not Just Dicta:** Although the Court's equitable remedy discussion was "purely dicta" (according to Justice Scalia), lower courts have applied the equitable remedies discussed in *Amara*. 
Post-Amara Themes

► **Contract Reformation**: Courts have applied contract reformation law, instead of trust reformation law.

► **Equitable Estoppel is Still Extraordinary**: Some plaintiffs have argued that equitable estoppel does not require a showing of extraordinary circumstances because this element is not mentioned by the Supreme Court, but lower courts have not adopted this argument.

► **Class Actions and Estoppel**: At least one lower court has allowed an ERISA class action to proceed, even though an equitable estoppel remedy requires a showing of detrimental reliance.
SPD and Plan Cases: When No Plan

- Courts disagree over whether a SPD constitutes the plan when there is no actual plan.
  - The Ninth Circuit has held that a SPD does not constitute a plan in the absence of an actual plan. *Prichard v. Metro. Life Ins. Co.* (9th Cir. 2015).
  - The Eastern District of Texas has held the opposite, finding that an SPD can serve as the plan when there is no other document. *Rhea v. Alan Ritchey Inc.* (E.D. Tex. Mar. 30, 2015).
If an SPD and the plan do not conflict, then the SPD can be enforced.

- *Bd. of Trs. of Nat’l Elevator Indus. Health Benefit Plan v. Montanile*, (11th Cir. 2014) (enforcing a SPD when it is the only document that specifies how payments are made).

- *Eugene S. v Horizon BCBS of N.J.*, (10th Cir. 2011) (interpreting *Amara* to mean that a SPD is not enforceable only when it conflicts with the plan documents).

- *Bidwell v. Univ. Med. Cent. Inc.*, (6th Cir. 2012) (stating *Amara* does not apply when there is no conflict between the SPD and the plan).
The Supreme Court considered language from a SPD to be the language of the plan when both lower courts based their decision solely on the SPD language. *US Airways v. McCutchen* (U.S. 2013).

The Third Circuit also recognized SPD language as plan language when both parties to the litigation treated the SPD language as the plan language. *Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan v. McLaughlin* (3d Cir. 2014).

SPD is enforceable if it is incorporated by the Plan.

Tenth Circuit found SPD enforceable because it was incorporated into the plan. *Eugene S. v. Horizon BCBS of N.J.* (10th Cir. 2011).

A written plan's express incorporation of a SPD makes the SPD enforceable as part of the plan. *Tetreault v. Reliance Standard Life Ins. Co.* (1st Cir. 2014).
Courts generally apply a *de novo* standard of review when the SPD grants the plan administrator discretionary authority (and the plan is silent or ambiguous on the subject).

- *Oldoerp v. Wells Fargo & Co. Long Term Disability Plan*, 500 (9th Cir. 2012).
- **But see** *Prezioso v. Prudential Ins. Co. of Am.* (8th Cir. 2014) (finding abuse of discretion was the appropriate standard of review for a plan with ambiguous language because the SPD clearly stated that the administrator had discretion to interpret plan terms).
Dismissed Cases Resurrected After Amara

Before Amara, district courts had dismissed cases that sought money damages because they found these to be legal remedies unavailable under ERISA. After Amara introduced the equitable remedies of estoppel, reformation, and surcharge, many of these cases were resurrected.

- Silva v. Metro. Life Ins. Co. (8th Cir. 2014) ("We agree and direct the district court to allow [Plaintiff] to amend his complaint to add his claims against [Defendants] under section [502(a)(3)] based on the equitable theories of surcharge, reformation, and equitable estoppel as described by the Supreme Court in Amara.")

- Kenseth v. Dean Health Plan, Inc. (7th Cir. 2013) ("CIGNA substantially changes our understanding of the equitable relief available under section [502(a)(3)].")
Lower courts have been consistent in giving effect to the Supreme Court's *Amara* equitable-remedy discussion.

- *Skinner v. Northrop Grumman Ret. Plan B* (9th Cir. 2012) (acknowledges that the remedy discussion was dicta, but then analyzes section 502(a)(3) relief under *Amara*).
- *Gearlds v. Entergy Services Inc.* (5th Cir. 2013) ("Even assuming it is dictum, however, we give serious consideration to this recent and detailed discussion of the law by a majority of the Supreme Court.").
- *McCravy v. Metro. Life Ins. Co.* (4th Cir. 2012) ("Even assuming for the sake of argument that it is [dicta], we cannot simply override a legal pronouncement endorsed just last year by a majority of the Supreme Court.").
Examples of Reformation

► Reformation

► Court ordered plan reformed so that participants receive their benefits under the previous DB plan *PLUS* their new lump-sum benefits, instead of participants only receiving their lump-sum benefit with an amount that was supposed to include the accrued DB benefit. *Amara v. Cigna* (2d Cir. 2014).

► Plaintiff was granted reformation under section 502(a)(3) to reform the terms of her life insurance policy to comply with state law. The court noted that the plaintiff could have also achieved this result under section 502(a)(1)(B). *Haung v. Life Ins. Co. of N. Am.* (E.D. Mo. 2014).
What Type of Reformation?

- Reformation differs under trust law and contract law:
  - Trust Law: Reformation should be consistent with settlor's intent.
  - Contract Law: Reformation reflects the parties' understanding of the contract terms at the time of agreement.

- The Second Circuit in *Amara v. Cigna* held that contract reformation applied because:
  - The Supreme Court referenced contract reformation in *Amara*.
  - Trust reformation itself is dictated by contract law when consideration is involved in the creation of the trust.
  - The employment agreement represents consideration by the employee.

- The Ninth Circuit has twice noted that it is unsure whether trust or contract reformation applies, but has not yet ruled on the issue. *Gabriel v. Alaska Elec. Pension Fund* (9th 2014); *Skinner v. Northrop Grumman Ret. Plan B* (9th 2012).
Extraordinary Circumstances

► In Amara, the Supreme Court noted that a plaintiff needs to prove detrimental reliance to prevail on an equitable estoppel claim.

► Some plaintiffs have argued that they no longer need to show extraordinary circumstances to prevail on their estoppel claims because the Supreme Court made no mention of extraordinary circumstances when discussing plaintiffs' equitable estoppel remedy. This argument has been uniformly rejected:

► Engers v. AT&T, Inc. (3d Cir. 2011) (continuing to require extraordinary circumstances for estoppel).

► Gabriel v. Alaska Elec. Pension Fund (9th Cir. 2014) (same).

Class Actions and Estoppel

► Equitable estoppel requires a showing of detrimental reliance and this could make class certification for a section 502(a)(3) claim difficult or impossible.

► Research only revealed one case that granted class certification for an equitable estoppel claim post-Amara. However, the district court's final decision provided relief under section 502(a)(1)(B) and not equitable estoppel under section 502(a)(3). Davidson v. Henkel Corp. (E.D. Mich. 2014).

► In Davidson, the court ordered class certification for an equitable-estoppel claim because the plaintiffs asserted that their reliance was based on uniform communications sent by the employer to all class members and not based on individualized communications from the employer. The court inferred detrimental reliance based on the uniform communications by the employer to all its employees.
Examples of Surcharge

► Fiduciaries breached their duty by not properly responding to participant's inquiry about how to keep her life insurance policy. Court finds sufficient harm to award equitable surcharge under section 502(a)(3) in the amount of **$440,000.** *Echauge v. Metro. Life Ins. Co.* (N.D. Cal. 2014).

► Fiduciaries breached their duty by misrepresenting that plaintiff was enrolled in life insurance policy, and court imposed surcharge of **$784,000** to remedy the misrepresentation. Beneficiary did not possess accurate benefit eligibility documents at the time of her benefit enrollment and was led to believe that she was entitled to life insurance benefits because of the misrepresentations made to her in the employer's benefits web portal. *Rainey v. Sun Life Assur. Co. of Canada* (M.D. Tenn. 2014).
Examples of Surcharge

- Plan administrator was also fiduciary and breached its duty to provide the beneficiary with a SPD and inform her of her life insurance policy conversion rights. Court awarded surcharge remedy of $120,000. *Weaver Bros. Ins. Assocs., Inc. v. Braunstein* (E.D. Penn. 2014).
Court granted Plaintiff's motion for summary judgment on her estoppel claim against her employer and the plan and then in a later ruling granted her surcharge breach of fiduciary duty claim against her employer and the plan. The Plaintiff sought to recover $103,000 in life insurance benefits from her deceased father's policy. The employer had repeatedly informed the decedent in writing that they would continue to pay his life insurance premiums, then they did not. The Court said that Plaintiff cannot double recover, but noted that in the event one claim loses on appeal, the other successful claim can provide relief. *Winkelspecth v. Gustave A. Larson Co.* (E.D. Wis. 2012).
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Steven L. Severson
Partner | Minneapolis
+612 766 7310
steven.severson@FaegreBD.com

Thomas W. Carroll
Associate | Denver
+303 607 3584
thomas.carroll@FaegreBD.com