

# Compensation Planning Journal

## The Supreme Court's *Cigna v. Amara* Decision: Surprises and Curiosities

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### INTRODUCTION

In May, the United States Supreme Court decided the long-awaited case of *CIGNA Corp. v. Amara*,<sup>1</sup> which had presented a number of issues under the Employee Retirement Income Security Act (ERISA) with respect to CIGNA's conversion of its traditional pension plan to a cash balance plan. In this monumental decision, the Court declared that plan participants may not base a claim for benefits under ERISA §502(a)(1)(B) on terms in summary plan descriptions (SPDs) that are inconsistent with official plan documents. The Court also held that §502(a)(1)(B) does not permit a court to reform a plan to comply with more-favorable terms of an SPD. While the Court espoused this limited view of viable benefits claims and remedies under §502(a)(1)(B), the majority went on to take a surprisingly expansive view of possible claims and remedies available under ERISA §502(a)(3). The Court has now declared that a form of monetary compensation is available under §502(a)(3) — a holding that is contrary to nearly everyone's understanding of prior Supreme Court precedent.

This article compares the holdings of *CIGNA* with prior precedent and discusses why both the §502(a)(1)(B) and §502(a)(3) holdings caught most practitioners by surprise.

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<sup>1</sup> 131 S. Ct. 1866 (2011).

### FACTUAL BACKGROUND OF THE CASE — CIGNA'S PLAN CONVERSION

This case arose out of CIGNA's conversion of its traditional defined benefit pension plan to a new "cash balance" type of pension plan. By amendment, CIGNA froze benefit accruals under its traditional pension plan for all but the most senior participants.<sup>2</sup> Then, it set up the new cash balance plan by a second (retroactive) amendment. Rather than receiving a set benefit for life based on salary and length of service under the old plan, retiring employees under the new cash balance format would instead receive the amount of money reflected in individual hypothetical "accounts," consisting of employer contributions and interest credits, either in a lump sum or an annuity purchased by the money in their respective accounts.

Under the new plan, participants received a hypothetical opening account balance purportedly based on the value of the benefit they had already earned under the old plan (computed as the actuarial value of their current accrued annual benefit at age 65). CIGNA then credited participants' accounts with benefit credits, consisting of a percentage of their salary, and interest credits based on the yield on five-year Treasury bills. A retiree would receive *the greater of* his benefit under the old plan at the time it was frozen (Part A) *or* his account balance under the cash balance plan (Part B).

Because participants' opening account balances under the cash balance plan did not include the value of certain benefits to which they were entitled under the old plan, such as subsidized early retirement benefits and a free survivor's benefit, participants' opening account balances were in many cases significantly less than the actual value of their accrued benefit under the old plan. These participants experienced what is commonly known as "wear-away" in plan conversions in-

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<sup>2</sup> Certain participants whose combined years of age and service equaled at least 45 were grandfathered, continued to accrue benefits under the old plan, and did not participate in the new cash balance plan.

volving a “greater of” plan benefits formula. Wear-away refers to the period of time during which a participant’s retirement benefit does not grow, despite his continuing to work and receive “credits” to his pension account, because his account balance (Part B) remains less than the employee’s minimum benefit under the old plan (Part A). For that period of time, his “greater” benefit is always the frozen benefit under the old plan, and he has earned nothing more.

The participants received several communications about CIGNA’s new retirement program in the form of newsletters and SPDs. At no time did CIGNA disclose the wear-away effect of the conversion. In addition, there were representations in the SPDs that led employees to believe that *all* of their Part A benefits, including early retirement subsidies, were protected in their opening account balances in the cash balance plan, when this was not actually the case. In other words, while the SPDs failed to disclose any of the negative implications of the conversion, CIGNA otherwise touted the advantages of the new plan, representing that the new plan was an “enhancement” over the old plan, that benefits would grow faster and steadier under the new plan, and that participants would be immediately earning a dollar of retirement benefit for each dollar credited to their accounts under the new plan.

When employees discovered that their pension benefits under the new plan were not what they thought CIGNA had promised, they filed a class action challenging the conversion and the new plan under various sections of ERISA. Their claims included that the cash balance plan was age-discriminatory and violated ERISA non-forfeiture and anti-backloading rules. They also claimed that the required notices and disclosures that were provided to participants under ERISA were inadequate and misleading because they did not properly illustrate the negative effects of the changes on plan participants’ retirement benefits.

## THE CIGNA LOWER COURT DECISIONS

After a seven-day bench trial, Judge Kravitz of the U.S. District Court for the District of Connecticut issued two decisions — one on liability<sup>3</sup> and another on remedies.<sup>4</sup> Substantively, the district court found CIGNA’s cash balance plan to be lawful in all respects; it did not discriminate on the basis of age, and it did not constitute an unlawful forfeiture of ben-

efits<sup>5</sup> or violate the minimum accrual (or anti-backloading) rules of ERISA.<sup>6</sup> The court also concluded, however, that CIGNA, as plan administrator, had violated various notice and disclosure requirements in ERISA: namely, the requirement that plan administrators notify participants of significant reductions in the rate of their future benefit accruals,<sup>7</sup> that they notify participants of material modifications to their plan “in a manner calculated to be understood by the average plan participant,”<sup>8</sup> and that they provide participants with an SPD describing the plan that is “sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.”<sup>9</sup> The court found that CIGNA intentionally misled its employees about the negative impact of the plan changes on their benefits by their statements suggesting that the opening account balances included the value of all their benefits under the old plan and assuring the participants that they would be earning additional benefits by virtue of the pay and interest credits being made to their accounts.

The district court addressed the standard of harm required for relief for the disclosure violations. Relying on Second Circuit precedent, it rejected CIGNA’s argument that the plaintiffs should be required to show that they detrimentally relied on the SPDs, and instead concluded that they must only show that they were “likely harmed” by the misleading disclosures, which is akin to a presumption of prejudice. The plaintiffs met this relatively light burden, the court concluded, because, for instance, they lost the opportunity to object to the conversion and to consider leaving CIGNA for another employer with a more favorable pension plan.

In fashioning a remedy, the court concluded that CIGNA’s representations in the SPDs should become part of the terms of the cash balance plan, and it thus ordered the plan reformed to entitle a retiring participant to Part A *plus* Part B — all his benefits under the old plan in the form those benefits were previously offered plus all the additional benefits (not the opening account balance) he accrued under the cash balance plan by virtue of the pay and interest credits made to his “account” after the conversion. The district court reasoned that because this remedy involved the em-

<sup>3</sup> ERISA §203(a) requires that every pension plan “shall provide that an employee’s right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age . . . .”

<sup>6</sup> ERISA §204 requires that a pension plan satisfy one of three technical tests to ensure that participants accrue retirement benefits steadily during their employment.

<sup>7</sup> ERISA §204(h).

<sup>8</sup> ERISA §102.

<sup>9</sup> *Id.*

<sup>3</sup> *Amara v. CIGNA Corp.*, 534 F. Supp. 2d 288 (D. Conn. 2008).

<sup>4</sup> *Amara v. CIGNA Corp.*, 559 F. Supp. 2d 192 (D. Conn. 2008).

ployees' entitlement to benefits under the terms of the newly-reformed plan, it was authorized under ERISA §502(a)(1)(B).<sup>10</sup> The court declined to decide whether the plaintiffs were entitled to "appropriate equitable relief" under ERISA §502(a)(3).

Recognizing the complexity of the issues and the unsettled state of the law, Judge Kravitz *sua sponte* stayed both the decision on liability and the decision on remedies pending the Second Circuit's review of the case. In a one-page decision, the Second Circuit affirmed "for substantially the reasons stated in Judge Kravitz's two well-reasoned and scholarly opinions."<sup>11</sup>

## THE SUPREME COURT'S DECISION

The Supreme Court vacated the Second Circuit's affirmance and remanded the case to the lower court. The Court held that ERISA §502(a)(1)(B) authorizes a court to enforce the terms of a plan as written, not to change those terms; a reformation of a contract is an equitable remedy not encompassed by ERISA §502(a)(1)(B). And, it flatly rejected the concept that the terms of the plan include the provisions in the SPD. The Court found that concept to be contrary to ERISA, which requires plan administrators to provide participants with SPDs setting forth their rights "*under the plan*"; these words suggest that the SPD is not itself part of the plan. It then noted that including terms of an SPD as part of the plan would run afoul of ERISA's division of authority between plan sponsors and plan administrators. Plan sponsors have the right to set the terms of a plan. Plan administrators are charged with the responsibility of notifying participants of a plan's provisions in SPDs and other required disclosures. Allowing the terms of an SPD to become part of the plan itself would "giv[e] the administrator the power to set plan terms indirectly by including them in the summary plan descriptions."<sup>12</sup> Finally, the Court noted that the basic nature of an SPD — a simple and understandable summary for the average participant — could change to "the language of lawyers" if the SPD were part of the official plan document. The Court concluded that SPDs "provide communication with beneficiaries *about* the plan, but . . . statements do not themselves constitute the *terms* of the plan for purposes of §502(a)(1)(B)."<sup>13</sup>

The Court could have ended its opinion there. Instead, it went on to answer the question "[i]f

§502(a)(1)(B) does not authorize entry of the relief here at issue, what about nearby §502(a)(3)?"<sup>14</sup> The Court addressed whether the "other appropriate equitable relief" language of §502(a)(3) could support the equivalent of the relief ordered by the district court. The Court articulated three possible equitable remedies under §502(a)(3) to do just that. First, the district court could reform the plan. To be entitled to this relief, a plan participant would have to show that he was reasonably prudent in not recognizing the mistakes between the SPD and the plan document. Next, a plan participant could be granted relief under an equitable estoppel theory, in which case, a plan participant would have to show detrimental reliance on the misleading disclosure. Third, the Court pointed to the equitable theory of "surcharge," which would allow retirees to be made whole through an award of monetary compensation, provided they could show harm and causation.

Justice Scalia, joined by Justice Roberts, filed a concurring opinion. Justice Scalia agreed with the majority that the relief granted by the district court was not authorized by §502(a)(1)(B), but wanted to stop there "because I see no need and no justification for saying anything more than that."<sup>15</sup> Ultimately, Justice Scalia called the Court's §502(a)(3) holding "purely dicta, binding upon neither us nor the District Court. The District Court need not read any of it . . . ." <sup>16</sup>

Because the Court's holding — arguably *dicta* — on the scope of relief available under §502(a)(3) came as such an enormous shock and appears directly contrary to what everyone understood the Supreme Court's prior decisions on this issue to have held, this article will address that section of the *CIGNA* decision first. Then it will discuss the case with respect to the SPD issue, and conclude with thoughts about where this leaves plaintiffs for future cases.

## THE §502(a)(3) SURPRISE

Prior to the Supreme Court's *CIGNA* decision, pretty much everyone believed the law in this area was settled: ERISA plaintiffs could not get monetary relief under §502(a)(3), because money is legal, not equitable, relief. All lower courts seemed to understand and accept that monetary awards were generally *not* available under §502(a)(3), with a singular exception for equitable restitution claims. In those cases, the courts were sure to distinguish equitable restitution from "monetary compensation" or "damages,"

<sup>10</sup> ERISA §502(a)(1)(B) authorizes a participant to bring an action "to recover benefits due to him under the terms of his plan . . . or to clarify his rights to future benefits under the terms of the plan . . . ."

<sup>11</sup> *Amara v. CIGNA Corp.*, 348 Fed. Appx. 627 (2d Cir. 2009).

<sup>12</sup> *CIGNA*, 131 S. Ct. at 1877.

<sup>13</sup> *Id.* at 1878.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1882 (Scalia, J., concurring).

<sup>16</sup> *Id.* at 1884.

and to precisely fit the scope of the relief to funds that could be traced to a segregated account in the defendant's possession, thereby invoking equitable theories like constructive trust and equitable liens. This was the accepted rule for good reason: the Supreme Court's precedent on this issue — specifically, *Mertens v. Hewitt Associates*, *Great-West Life & Annuity Insurance Company v. Knudson*, and *Sereboff v. Mid Atlantic Medical Services, Inc.* — was clear.

In *Mertens v. Hewitt Associates*,<sup>17</sup> the first pertinent Supreme Court case, a class of retirement plan participants asserted claims for relief under §502(a)(3) against the actuary of the plan who allegedly participated in fiduciary breaches. The Court expressly stated that the sole question before it was whether monetary relief was available under the “other appropriate equitable relief” clause of §502(a)(3). The Court's answer was “no.”

The Court undertook a lengthy discussion of the meaning of the phrase “equitable relief.” It examined courts of equity historically and noted that those courts had broad power to impose various remedies for breaches of trust, including legal remedies like compensatory damages. Merely because courts of equity had the power to grant all remedies for breach of trust, however, does not mean that all the kinds of relief granted by those courts constituted “equitable relief” or should now be available as “other appropriate equitable relief” under §502(a)(3). Indeed, the Court found that interpreting the phrase “equitable relief” in §502(a)(3) to include all relief that courts of equity historically had granted would render the “equitable” modifier superfluous:

Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under §502(a)(3) to “equitable relief” in the sense of “whatever relief a common-law court of equity could provide in such a case” would limit the relief *not at all*.<sup>18</sup>

Instead, the Court held that only “those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)” should be available under the “other appropriate equitable relief” provision of §502(a)(3).<sup>19</sup>

The Supreme Court's next major §502(a)(3) decision came in *Great-West Life & Annuity Insurance*

*Company v. Knudson*.<sup>20</sup> This case arose out of a provision in a health and welfare plan that required reimbursement to the insurance company of benefits payments made when the beneficiary recovered the payments from a third party. In this case, medical expenses covered by the plan were incurred as a result of injuries sustained in a car accident, after which the beneficiary settled liability claims with the car manufacturer. Great-West, the insurance company, asserted that it should be reimbursed pursuant to the terms of the plan, invoking §502(a)(3). It argued that monetary relief had been available in courts of equity for breach of trust at common law and so should be available as §502(a)(3) equitable relief. Relying on its decision in *Mertens*, the Court stated unequivocally that “[t]hese trust remedies are simply inapposite,” and reiterated that “the term ‘equitable relief’ in §502(a)(3) must refer to “those categories of relief that were *typically* available in equity. . . .”<sup>21</sup>

The third Supreme Court decision of import was *Sereboff v. Mid Atlantic Medical Services, Inc.*<sup>22</sup> Like *Great-West*, *Sereboff* arose out of a reimbursement provision in a plan in which there had been a settlement of medical expenses incurred after injuries suffered in a car accident. Unlike in *Great-West*, however, the settlement funds had been set aside pending resolution of the reimbursement claim and, thus, were identifiable and traceable to a segregated account. This one fact triggered the traditionally equitable remedy of restitution (which requires identifiable funds in the possession of the defendant), which was not available in *Great-West*. In other words, the plaintiff in *Sereboff* could receive monetary relief because it came through a traditionally equitable remedy — essentially, the imposition of a constructive trust or equitable lien on particular, identifiable funds in the defendant's possession. The *Sereboff* Court again reiterated that “compensatory damages” were *not* available under §502(a)(3).<sup>23</sup>

All this changed when the *CIGNA* Court suggested that on remand the district court could award *CIGNA* retirees money under a “surcharge” remedy pursuant to §502(a)(3).<sup>24</sup> The Supreme Court noted that the lawsuit was essentially one for breach of trust, which traditionally could only have been brought in a court

<sup>20</sup> 534 U.S. 204 (2002).

<sup>21</sup> *Mertens*, 508 U.S. at 256.

<sup>22</sup> 547 U.S. 356 (2006).

<sup>23</sup> *Id.* at 361 (quoting *Mertens*, 508 U.S. at 255–56).

<sup>24</sup> Scholars, practitioners, and courts all have widely accepted the Supreme Court's precedent as having conclusively established that money damages were not available under §502(a)(3). See, e.g., Medill, “Resolving the Judicial Paradox of ‘Equitable’ Relief Under ERISA Section 502(a)(3),” 39 *J. Marshall L. Rev.* 827, 942 nn. 174–76 (2006) (citing cases).

<sup>17</sup> 508 U.S. 248 (1993).

<sup>18</sup> *Id.* at 258.

<sup>19</sup> *Id.* at 256.

of equity. The Court also recognized that “the remedies available to those courts of equity were traditionally considered equitable remedies.”<sup>25</sup> And, the remedies that a court of equity could award in these types of cases included monetary relief, in the form of surcharge. Contrary to its earlier pronouncements, the Court then concluded that because courts of equity historically could award monetary relief, that remedy should also be available under §502(a)(3).

The Court’s holding in this regard is awfully hard to square with *Mertens*, which ran through nearly the identical analytical steps reaching an opposite conclusion. In fact, this decision echoes closely the *dissent* in *Mertens*: “The text of the statute supports a reading of §502(a)(3) that would permit a court to award compensatory monetary relief where necessary to make an ERISA beneficiary whole for a breach of trust.”<sup>26</sup> The *CIGNA* Court did try to distinguish *Mertens* in its opinion: “[I]nsofar as an award of make-whole relief is concerned, the fact that the defendant in this case, unlike the defendant in *Mertens*, is analogous to a trustee makes a critical difference.”<sup>27</sup> But this point ignores the fact that the *Mertens* Court specifically excluded from its consideration the question whether the fiduciary or non-fiduciary status of the defendant made a difference — deciding only the question of what kind of relief was available under §502(a)(3) *regardless* of who the defendant was. And even were that not the case, the distinction could hardly undermine *Mertens*’ clear instruction that §502(a)(3) “equitable relief” did *not* include all remedies that could be granted by a court of equity at common law. The *CIGNA* Court did not even attempt to distinguish its *Great-West* decision.

There is another reason why the Supreme Court’s announcement that a surcharge is an available remedy under §502(a)(3) is so surprising and curious. This issue was squarely before the Court in another case just three years ago, and the Court chose not to address it.<sup>28</sup> In *LaRue v. DeWolff, Boberg & Associates*, the Fourth Circuit Court of Appeals issued a decision denying monetary relief under §502(a)(3) based on reasoning that turns out to be directly contrary to the *CIGNA* decision.<sup>29</sup> On certiorari to the Supreme Court, the plaintiff and the Department of Labor argued for

the remedy of surcharge.<sup>30</sup> But, while it recognized that the relief issue was properly before it, the Supreme Court held that it need not reach the issue given its holding under another ERISA section.<sup>31</sup> How ironic that the Supreme Court actively avoided taking on the surcharge issue in the *LaRue* case, but then stretched to address it in *CIGNA*, arguably in *dicta*. One wonders: is this a case of bad facts making bad law?

## WHAT IS “SURCHARGE?”

Surcharge is a remedy that arises in cases involving a breach of trust. The *CIGNA* Court gave some instruction, articulating three elements that a plaintiff must show to be granted a surcharge: (1) there must be a breach of trust by a fiduciary; (2) there must be actual harm suffered by the beneficiary; and (3) the breach must have caused the harm. The Restatement (Third) of Trusts also provides guidance — a trustee who commits a breach is “chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered.”<sup>32</sup> In other words, where the breaching trustee causes a loss, he is “surcharged” to compensate for it. Surcharge is thus one form of what courts and commentators often call “make-whole relief” — the surcharge imposed is supposed to make the beneficiary who suffered a loss “whole.”<sup>33</sup> Putting this all into “ERISA-speak,” this means that the underlying claim should involve a fiduciary, and the participants will need to allege a breach of duty, causation, and resulting harm.

The wheels are already in motion in pending cases. On the exact same day that the Supreme Court handed

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by the value of his own loss — was not available under §502(a)(3)), *vacated and remanded on other grounds*, 552 U.S. 248 (2008).

<sup>25</sup> Brief for the United States as *Amicus Curiae* Supporting Petitioner, *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008) (No. 06-856), 2007 WL 2274791. See *Tullis v. UMB Bank, N.A.*, 515 F.3d 673, 678 n.5 (6th Cir. 2008). In fact, the Department of Labor had long argued for surcharge as a form of monetary relief that should be available under §502(a)(3), but had been rejected or ignored by every court. As a result, perhaps no one was more surprised by *CIGNA* than the Department itself. See *Employment Policy & Law Daily* (June 15, 2011), available at 2011 WL 2323645 (Department of Labor attorney, Elizabeth Hopkins, describes the §502(a)(3) element of the Supreme Court’s recent decision in *CIGNA* as “incredibly surprising,” recognizing that before *CIGNA* “virtually every court of appeals has rejected” the availability of monetary relief.).

<sup>30</sup> *LaRue*, 552 U.S. at 252.

<sup>31</sup> Restatement (Third) of Trusts §205(b) (T.D. No. 5, 2009).

<sup>32</sup> See, e.g., *CIGNA*, 131 S. Ct. at 1880; Restatement (Third) of Trusts §205 (T.D. No. 5, 2009). And, concomitantly, it provides only compensatory relief to make the beneficiary whole, not punitive relief. Austin W. Scott et al., *Scott and Ascher on Trusts*, 1694–95 (5th ed. 2006).

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<sup>25</sup> *CIGNA*, 131 S. Ct. at 1879 (citations omitted).

<sup>26</sup> See *Mertens*, 508 U.S. at 274 (White, J., dissenting).

<sup>27</sup> *CIGNA*, 131 S. Ct. at 1880.

<sup>28</sup> *LaRue v. DeWolff, Boberg & Assocs. Inc.*, 552 U.S. 248, 252 (2008).

<sup>29</sup> 450 F.3d 570 (4th Cir. 2006) (holding that “make-whole” relief was not available under §502(a)(3), that the type of action (i.e., breach of trust) and the type of defendant (i.e., trustee) did not affect the types of “equitable relief” available, and that what plaintiff sought — recovery of monetary compensation measured

down its decision in *CIGNA*, the Fourth Circuit issued a decision denying monetary relief under §502(a)(3).<sup>34</sup> That case involved accidental death benefits where the beneficiary was not properly notified of her dependent's disqualification. The district court denied consequential damages, and the Fourth Circuit affirmed, holding that, based on *Mertens* and *Great-West*, monetary relief was unavailable. Following *CIGNA*, the Department of Labor has predictably filed a brief asking the Fourth Circuit to rehear the case *en banc*, and to reverse the decision in order to bring it in line with *CIGNA* under the surcharge theory. Undoubtedly, this is only the beginning of what is sure to be a rising sea of surcharge requests.

### §502(a)(3) RELIEF WAS NOT THE ONLY SURPRISE IN *CIGNA* — LET'S TALK SPDs

As noted above, the Court's holding that relief was potentially available to the *CIGNA* plaintiffs under §502(a)(3) came on the heels of its holding that the relief in question could *not* be awarded under §502(a)(1) — the section pertaining to benefit claims. Although the district court attempted to reform the *CIGNA* plan based on representations made (or omitted) in the SPD, the Supreme Court held that SPDs do not constitute plan "terms," and thus, benefit claims cannot be based simply on what is contained in an SPD. This holding too, was surprising to many practitioners, as it conflicts with a body of law widely adopted by lower courts, often referred to as the "SPD prevails" rule.

Prior to *CIGNA*, all federal courts of appeal had held that, under certain circumstances, SPD terms prevailed over conflicting plan terms when the SPD was more favorable to participants.<sup>35</sup> The Third Circuit stated the rule clearly and concisely:

[W]e join several other Circuits in ruling that when a summary plan description under

ERISA conflicts with the complete, detailed ERISA plan document, a plan participant may nevertheless state a claim for plan benefits based upon terms contained in the summary plan description.<sup>36</sup>

These courts aligned themselves with ERISA's goal of protecting participants, and specifically, Congress's recognition that "[i]t is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in the plan booklets."<sup>37</sup>

The courts differed, however, on the standard of harm (if any) that participants must prove to be entitled to a claim for benefits under the terms of an SPD. Some courts applied the "SPD prevails" rule without requiring any showing of prejudice or reliance on the part of the participant.<sup>38</sup> These courts often reasoned that the SPD serves as a summary of the plan, which is a contract, and should be enforced as part of the contract. Because enforcement of a contract generally does not require proof of reliance or prejudice, reliance should not be a requisite to a participant's claim for benefits in accordance with the SPD.

Other courts required proof of reliance and prejudice on the part of the participant before he could claim benefits on the basis of an SPD's terms. For instance, the Eleventh Circuit required a showing of both reliance and prejudice — or detrimental reliance — before a participant was entitled to benefits based on the terms of an SPD that were more favorable than conflicting plan terms.<sup>39</sup> Other courts had a more lenient standard, requiring either reliance or prejudice, reasoning that a rule requiring detrimental reliance "imposes an insurmountable hardship on plaintiffs," and that a prejudice standard is more in line with Congress's intent to protect ERISA participants and beneficiaries.<sup>40</sup>

<sup>34</sup> *McCravy v. Metropolitan Life Ins. Co.*, 50 EBC 2773, 2011 WL 1833873 (4th Cir. 2011).

<sup>35</sup> See, e.g., *Haus v. Bechtel Jacobs Co.*, 491 F.3d 557, 565 (6th Cir. 2007); *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 113 (2d Cir. 2003); *Burstein v. Ret. Account Plan for Emps. of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 378 (3d Cir. 2003); *Barker v. Ceridian Corp.*, 122 F.3d 628, 633 (8th Cir. 1997); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515 (10th Cir. 1996); *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1321 (9th Cir. 1995) (overruled on other grounds); *Aiken v. Policy Management Systems Corp.*, 13 F.3d 138, 141 (4th Cir. 1993); *Senkier v. Hartford Life & Acc. Ins. Co.*, 948 F.2d 1050, 1051 (7th Cir. 1991); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 981–82 (5th Cir. 1991); *McKnight v. S. Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985); *Govoni v. Bricklayers, Masons & Plasterers Int'l Union of Am., Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984).

<sup>36</sup> *Burstein*, 334 F.3d at 368.

<sup>37</sup> *Haus*, 491 F.3d at 565 (quoting H.R. Rep. No. 533, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4646); see also *Burke*, 336 F.3d at 112 (noting ERISA's objective is to protect the employee against inadequate SPDs); *Burstein*, 334 F.3d at 378 (noting that Congress intended for employees to rely on the SPD).

<sup>38</sup> See, e.g., *Washington v. Murphy Oil*, 497 F.3d 453, 456 (5th Cir. 2007); *Burstein*, 334 F.3d 365.

<sup>39</sup> See *Branch*, 955 F.2d at 1578–79.

<sup>40</sup> See, e.g., *Palismano v. Allina Health Sys., Inc.*, 190 F.3d 881, 887–88 (8th Cir. 1999); *Chiles v. Ceridian Corp.*, 95 F.3d 1505 (10th Cir. 1996); *Govoni*, 732 F.2d at 252.

## **CIGNA’S EFFECT ON THE “SPD PREVAILS” RULE**

All of the case law based on application of the “SPD prevails” rule is in question now that the Supreme Court has said that there can be no benefits claims under §502(a)(1)(B) based on SPDs. But, *CIGNA*’s effect on the “SPD prevails” rule might be more procedural than substantive. For sure, courts can no longer consider an SPD to be part of the official plan document and automatically award benefits to participants under §502(a)(1)(B) on the basis of more generous provisions in an SPD. But if, as the Supreme Court suggested, courts can reform a plan to comport with the terms of a contrary SPD as an equitable remedy under §502(a)(3), it appears that participants may continue to receive benefits consistent with their SPD, at least in certain circumstances. The parameters of this remedy are unknown: Will it be available only in situations in which the court is faced with an SPD containing “false and misleading information,” as in the *CIGNA* case, or will a good-faith mistake suffice?

The Supreme Court also put to bed the notion that a participant must prove detrimental reliance to be entitled to a benefit based on the terms of a more-favorable SPD, as some courts have required in claims under §502(a)(1)(B). In discussing the §502(a)(3) remedies that might be available to the *CIGNA* plaintiffs, the Court made clear that it is the un-

derlying claim theory that dictates the harm requirements — there is no general requirement that a participant prove detrimental reliance in order to get relief for an inaccurate or misleading SPD under §502(a)(3). For instance, when claiming equitable estoppel, detrimental reliance is a required element. And, when asking for surcharge for a breach of trust, harm (but not necessarily detrimental reliance) is a required element. The standard of harm will be based on the underlying equitable theory of the case, not on ERISA *per se*. Accordingly, the lack of prejudice or reliance should no longer be a complete bar to “SPD prevails” claims for relief under §502(a)(3) as some courts had previously held.

## **CONCLUSION**

Going forward, there can be no question but that the §502(a)(3) decision marks a huge change and a whole new world for ERISA plaintiffs seeking monetary awards. The “floodgates” are probably opening right now. On the other hand, although the §502(a)(1)(B) decision appears on its face to cut off a claim that most courts had previously recognized, the practical impact may be more of a whimper. The relief plaintiffs look for is likely still available, just in a different place.