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CIGNA Corporation, et al., v. Amara, et al – Part III

Where Do We Go From Here?

In *Client Bulletins 2011-31* and *2011-32* we discussed the case of *CIGNA Corporation, et al., v. Amara, et al.*, 2011 WL 1832824 (S. Ct.), Cause No. 09-804 ("CIGNA case"). In this case, the U.S. Supreme Court settled the question of whether plan participants can seek relief under *ERISA* Section 501(a)(1)(B) based upon the terms of a Summary Plan Description (SPD) and/or summaries of Plan changes such as Summaries of Material Modifications (SMMs) or *ERISA* Section 204(h) notices that are contrary to the terms of the Plan Document.

The CIGNA case has a lot of implications to grasp and we shall summarize some of those again. We will also address some specific areas concerning Plan summaries that plan sponsors and fund professionals should give close attention.

However, first, it may be helpful to give a general overview of the civil enforcement provisions of *ERISA* Section 501(a)-(m), the *ERISA* Section discussed in the CIGNA opinion. The CIGNA case focused on Section 501(a), which has 10 subsections that list the persons who are entitled to bring a civil action under *ERISA*. In the CIGNA case, the Supreme Court focused on civil enforcement of *ERISA* under Sections 501(a)(1)(B) [claim for benefits] and Section 501(a)(3) [claim for equitable relief]. In addition to Section 501(a)(3) using the term "equitable relief", the term is used in subsections (a)(5) and (a)(8) for actions primarily by the Secretary of Labor. The interpretation of "equitable relief" under these two Sections may be impacted by the Court's interpretation of the term under Section (a)(3). *ERISA* Section 501 is available by "*clicking here*" for those interested in further study.

Of a more immediate practical importance: *"What should plan sponsors do in light of the CIGNA decision?"*

One, plan sponsors can rest easier since an inadvertent or even reckless discrepancy between the Plan Document and the SPD will not give rise to a claim for benefits under *ERISA* Section 501(a)(1)(B).

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Two, plan sponsors should be ever vigilant in avoiding a discrepancy between the Plan and the SPD. If such a discrepancy was sufficiently egregious, it could give rise to a claim for fiduciary breach for failing to provide an accurate SPD as required under *ERISA* Section 102(a). This highlights the importance of accurately drafting SPDs and following the SPD content regulation at 29 CFR Section 2520.102-3. As shown in the CIGNA case, serious discrepancies can give rise to a claim for equitable relief under Section 501(a)(3).

However, just following the SPD content regulation is not enough. There may be areas of the Plan that the Trustees or administrator or fund professionals are aware of that are often misunderstood. In such cases, when revising the SPD special care should be taken to make these subject areas clear. Another example is that in pension SPDs subject to the PPA critical status rules, the SPD should mention that benefits may be cut back as allowed under the PPA. Individuals who revise SPDs should add to the SPD checklist items that are not listed but that are needed in the SPD for accuracy. This is a practice that the SPD revisers at UAS follow.

Further, in revising an SPD, care should be taken to get input from fund office staff. In some cases, what the SPD or Plan Document says is NOT what is being done. Generally SPDs for pension and health and welfare need to be revised every five years. Revision time will present a good opportunity to double-check operational practice vs. what is written in the SPD.

Three, exert the same diligence in providing summary of material modifications (SMMs). The SMM regulation is found at 29 CFR Section 2520.104b–3 and the relevant part says:

> (a) The **administrator** of an employee benefit plan subject to the provisions of part 1 of title I of the Act **shall**, in accordance with § 2520.104b–1(b), **furnish** a summary description of **any *material modification* to the plan AND any change in the *information required*** by Section 102(b) of the Act and Section 2520.102– 3 of these regulations **to be included in the summary plan description to each participant covered under the plan and each beneficiary receiving benefits under the plan.** Except as provided in paragraph (d) of this section, the plan administrator shall furnish this summary, written in a manner calculated to be understood by the average plan participant, **not later than 210 days after the close of the plan year in which the modification or change was adopted.**

Under the above requirements, an SMM is needed when a Trustee changes. For more detail, see *Research Memo 2007-15*. Special rules apply for material reduction in covered services or benefits under group health plans, including multiemployer plans, requiring notice within 60 days after such reductions – not the 210 days after the close of the plan year otherwise allowed for SMMs.

With the passage of the *Patient Protection and Affordable Care Act (PPACA),* new summaries of benefits and a change in rules will apply in 2012. We will be releasing a publication on the status of this change shortly. In short, *PPACA* Section 2715 requires the Plan to provide participants a 4-page or less summary

that describes benefit coverage under the group health plan and that uses uniform definitions of standard insurance and medical terms, as well as other information. As of now, group health plans will generally be required to use such documents and information for participants and others by **March 23, 2012**. This 4-page summary is in **addition to** the current Summary Plan Description (SPD) requirements.

The *PPACA* also changes the timing of giving a notice of material modifications for health plans for changes that are not reflected in the most recently provided 4-page summary of benefits and coverage. In such cases, the plan must provide notice of such a modification not later than 60 days **prior to** the date on which such modification will become effective. Under the current SMM Regulation, the plan had 60 days AFTER the reduction to provide notice. This new change currently will affect not only reductions but improvements and require a 60-day notice before the change takes effect.

The last specific benefit change summary mentioned in the CIGNA case concerned *ERISA* 204(h) Notices. Section 204(h) requires notice of *an amendment* to a pension plan that either:

- provides for a **significant reduction in the rate of future benefit accrual** or
- that **eliminates or significantly reduces** an *early retirement benefit* or *retirement-type subsidy.*

We will be publishing a detailed look at 204(h) Notices soon. As the CIGNA case noted, a failure to give a proper and timely 204(h) Notice may result in the underlying amendment being inoperative until the defect is cured. See *Benefit News Briefs 2008-18* on proposed amendments to the 204(h) Notice regulations under the PPA.

The last "benefit summary" that has been the subject of litigation, though not part of the CIGNA case, are benefit summaries. In these cases, the participant retired relying on the higher income shown in the benefit statement only to find out his benefits were lower and he could not afford to retire. In the future, we'll take a look at some of these cases too. "Detrimental reliance" seems to be the buzz-word.

Plans may have some type of protection by stating that benefits noted in any such summary may change due to various factors and the participant's final benefit may not be known for certain until actual retirement. Fund Counsel should be consulted on what qualifier may or may not work in the particular jurisdiction of the Plan as there generally are splits between the circuit court of appeals that should be noted when tailoring any such disclaimers. Again, diligence and continued rechecking for accuracy are the first line of defense.

Thomas Jefferson is quoted for saying,"*The Price of Liberty is Eternal Vigilance*."

A similar vigilance is needed to comply with the ever-increasing and dizzying array of laws and regulations affecting multiemployer pension and health and welfare plans.

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