

CIGNA V. AMARA: SUPREME COURT RESOLVES SEVERAL ERISA CLAIM ISSUES WHILE LEAVING OTHERS FOR THE LOWER COURTS*

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I. INTRODUCTION

On May 16, 2011, the United States Supreme Court, in an 8-0 opinion authored by Justice Breyer,¹ addressed an issue that the Court refused to consider some seven years earlier.² The decision rendered on May 16 in *CIGNA Corp. v. Amara* involved, at least preliminarily, consideration of whether a Summary Plan Description or other employer-generated documents or communications may under certain circumstances override conflicting terms in a Plan Document governed by the Employee Retirement Income Security Act (“ERISA”).³ The decision also addressed the correct legal standard applicable to a plan participant’s claims of an employer’s ERISA violations and what equitable remedies might be available to successful plaintiffs under ERISA Section 502(a)(3).⁴

In the weeks immediately following publication of the *CIGNA* opinion, numerous interpretations and comments were offered by, among others,

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¹ *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011). Justice Scalia filed a concurring opinion in which Justice Thomas joined. Justice Sotomayor took no part in the decision. *Id.*

² See generally *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004).

³ *CIGNA*, 131 S. Ct. at 1876-78.

⁴ *Id.* at 1878-83.

organizations whose members may be affected by the Court's ruling.⁵ Interestingly, it seems that the commentators, regardless of their specific employer- or employee-related interests, all find something favorable to those interests in the Court's lengthy and multi-faceted ruling.⁶ Whether the various interpretations are justified, they suggest that perhaps the Court's ruling may not be the final note on the issues it decided in this case.

Before addressing the facts specific to CIGNA Corporation's ERISA-governed plan, a brief historical perspective may clarify ERISA's purpose and assist in understanding the kinds of factual circumstances under which conflicts have arisen in the past and may arise in the future.⁷ Since the enactment of ERISA in 1974,⁸ the common law surrounding its disclosure requirements has both clarified and, in some cases, complicated the distribution of rights and obligations under the Act.⁹ Courts have recognized that appropriate plan disclosure is an essential element of the statute and have upheld suits brought by plan participants and beneficiaries aimed at enforcing the disclosed terms of benefit plans.¹⁰ The circuit courts are

⁵ See, e.g., Arthur D. Postal, *Supreme Court Favors CIGNA in Summary Plan Description Case*, LIFEHEALTHPRO (May 16, 2011), <http://www.lifehealthpro.com/2011/05/16/supreme-court-favors-cigna-in-summary-plan-descrip>; *Supreme Court Decision in Amara v. CIGNA a Victory for Workers and Retirees*, PENSION RIGHTS CENTER (May 16, 2011), <http://www.pensionrights.org/newsroom/releases/supreme-court-decision-amara-v-cigna-victory-workers-and-retirees>.

⁶ See sources cited *supra* note 5.

⁷ See generally Charles R. Peterson, *ERISA Does Not Give Employers a Free Pass: Refusing to Place the Burden of Careless Drafting on the Employee*, 9 NEV. L.J. 704 (2009) (addressing the reliance standard in ERISA plan and summary conflicts); Michael A. Valenza, *Accuracy Is Not a Lot to Ask: Decisions in the Second and Third Circuits Set the Tone for Litigation over Conflicts Between ERISA Plan Documents and Summaries*, 6 TENN. J. BUS. L. 361 (2005) (addressing cases arising from conflicting ERISA plan and summary disputes).

⁸ See generally Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of the United States Code, including 29 U.S.C. §§ 1001-1461 and 26 U.S.C. §§ 401-415 and 4972-4975).

⁹ See, e.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (explaining that "courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987))). See generally *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983).

¹⁰ See *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994) ("Adequate disclosure to employees is one of ERISA's major purposes."); see also *Layaou v. Xerox Corp.*, 238 F.3d 205, 211 (2d Cir. 2001)

unified in ruling that terms of the Summary Plan Description (“SPD”), an overview document that describes plan benefits and obligations in lay terms,¹¹ override conflicting terms in the Plan Document (“Plan”), the more complex and comprehensive document typically written in professional jargon.¹²

Employees who participate in ERISA-sponsored welfare or pension plans usually receive a copy of the SPD and not the lengthy Plan itself.¹³ Courts have recognized that because employees may only have these summaries to consult before making important decisions regarding employment, health care, and retirement,¹⁴ the summaries should be written accurately, distributed promptly, and made binding not only on the plan participant, but also on the Plan and its administrators.¹⁵ However, the same courts disagree about what elements are necessary to succeed on a claim for benefits denied or otherwise withheld.¹⁶ Thus, the circuit in which a claim is brought determines whether a plaintiff must show some form of reliance, detriment, or a

(“[E]mployees are entitled to rely on the SPDs as their primary source of information about their benefits.”).

¹¹ 29 U.S.C. § 1022(a) mandates that the summary plan description “shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.” 29 U.S.C. § 1022(a) (2006). Section 1022(b) delineates the specific items that must be addressed in the SPD, the most important of which for the topic at hand are “circumstances which may result in disqualification, ineligibility, or denial or loss of benefits.” *Id.* § 1022(b). Corresponding federal regulations provide a more detailed list of items required in an SPD, and specify the manner in which they are to be presented. 29 C.F.R. §§ 2520.102-2, 2520.102-3 (2010).

¹² Valenza, *supra* note 7, at 367-75.

¹³ *See* 29 U.S.C. § 1021(a) (2006) (“The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan: (1) a summary plan description described in section 1022(a)(1) of this title.”).

¹⁴ *See* *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. Research Found.*, 334 F.3d 365, 379 (3d Cir. 2003) (“The SPD is the document to which the lay employee is likely to refer in obtaining information about the plan and in making decisions affected by the terms of the plan.”); *see also* *Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050, 1051 (7th Cir. 1991) (“Nothing in ERISA requires that the insurance policy summarized in the summary plan document be given the insured.”).

¹⁵ *See* *Burstein*, 334 F.3d at 378.

¹⁶ *Id.* at 380 (the plan participant need not plead reliance on the SPD). *But see* *Senkier*, 948 F.2d at 1051 (the participant must rely on the SPD).

combination of the two as a result of a conflict between an SPD provision and the Plan language.

While the circuit courts that have addressed this question have crafted their decisions when Plans have been contradicted by SPDs,¹⁷ document conflicts where the documents in question are other than the SPDs have not been decided. Thus, the Supreme Court's decision in *CIGNA* does appear to be making new law on that issue; that is, an SPD may consist of more than a single summary plan description.¹⁸ The Supreme Court, however, did so much more than recognize the relevance of employer or plan documents and communications other than "Plans" and "SPDs." Its decision in *CIGNA* clarified the legal standard applicable to claims brought by employees and other beneficiaries, and, in so doing, it essentially reversed multiple prior circuit court rulings.¹⁹ Its decision also effectively restricted litigation based upon one of ERISA's remedy sections, while simultaneously opening up another section to ERISA plaintiffs.²⁰

In analyzing the *CIGNA* decision, it is useful to examine the legislature's purpose in enacting ERISA. Congress declared that one of its goals in enacting ERISA was:

[T]o protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.²¹

While Congress was expansive in explaining the purpose and function of the ERISA legislation,²² it was peculiarly reticent to prescribe a clear roadmap to be followed by the courts when those plan participants, employees, and beneficiaries

¹⁷ Valenza, *supra* note 7, at 367-76.

¹⁸ See *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1877 (2011).

¹⁹ *Id.* at 1880-82.

²⁰ *Id.* at 1878-80.

²¹ 29 U.S.C. § 1001(b) (2006).

²² *Id.*

were the apparent victims of ERISA violations. One might reasonably assume that the Congress was indeed allowing the courts to create a federal common law for such matters. While the Supreme Court's opinion in *CIGNA* would on its face appear to follow this Congressional declaration, the seemingly incongruously favorable remarks coming from opposite elements of ERISA-governed parties suggest that the import of the Court's decision upon the lower courts is yet to be seen. Whether *CIGNA* will encourage more litigation rather than result in less is likewise an unknown.

II. CIGNA CORPORATION'S ERISA VIOLATIONS: FACTUAL BASIS AND LOWER COURT RULING

Because the Court was very clear in stating that its "decision rest[ed] in important part upon the circumstances present,"²³ the facts surrounding this class action lawsuit must be explicitly described and understood. Prior to 1998, CIGNA Corporation ("CIGNA") had an ERISA-governed pension plan that provided a defined benefit for its retiring employees in the form of an annuity calculated on the basis of pre-retirement salary and length of service.²⁴ In November 1997, CIGNA announced via a newsletter that the pension plan would terminate on December 31, 1997 and that a new plan would go into effect on January 1, 1998, although the details of the new plan would not be explained to the employees until later in 1998.²⁵ Almost a year later, CIGNA supplied the plan details,²⁶ which showed that the new plan, contrary to the statements made in the newsletter, had the potential to reduce individual benefits.²⁷ CIGNA also failed to explain to employees the potential for "wear away," a phenomenon whereby a drop in interest rates would reduce individual account values and would require additional years of contributions to make up the loss.²⁸ In response to these inconsistencies, Janice Amara and the

²³ *CIGNA*, 131 S. Ct. at 1871.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 73. The newsletter provided (1) that full benefits earned as of December 31, 1997 would be deposited to the newly created individual employee accounts, (2) that retirement benefits would be the same or improved, and (3) that CIGNA would not see a cost saving. *See id.* at 1872-73.

²⁸ *Id.* at 1874.

several other named plaintiffs, individually and on behalf of some 25,000 current and retired employees of CIGNA, instituted a class action lawsuit against the corporation.²⁹ The plaintiffs claimed that CIGNA violated several of its ERISA obligations with respect to changes it made to its retirement plan.³⁰

Because CIGNA did not provide thorough, or even less than thorough, explanations of these aspects of the new plan and the risks to the employees, the district court found not only that the plan descriptions “were incomplete and inaccurate,” but also that “CIGNA intentionally misled its employees.”³¹ The district court concluded, as a matter of law, that CIGNA violated ERISA Sections 204(h), 102(a) and 104(b) as they existed in 1997-98.³² Section 204(h) “forbade an amendment of a pension plan that would ‘provide for a significant reduction in the rate of future benefit accrual’ unless the plan administrator also sent a ‘written notice’ that provided either the text of the amendment or summarized its likely effects.”³³ CIGNA had not supplied its employees with such a timely written notice.³⁴ Sections 102(a) and 104(b), “require a plan administrator to provide beneficiaries with summary plan descriptions and with summaries of material modifications, ‘written in a manner calculated to be understood by the average plan participant,’ that are ‘sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations.’”³⁵ CIGNA again failed to provide its employees with the requisite summary materials.³⁶

Having found, as a matter of law, that CIGNA violated its ERISA-mandated obligations, the district court proceeded to consider the remedies available to fashion the proper relief.³⁷ Justice Breyer related the district court’s five holdings regarding relief afforded to the plaintiff class members: “(1) that the evidence presented [at

²⁹ *Id.* at 1870.

³⁰ *Id.*

³¹ *Id.* at 1874.

³² *Id.* at 1874-75.

³³ *Id.* at 1874. (citations omitted).

³⁴ *Id.*

³⁵ *Id.* at 1874-75 (quoting 29 U.S.C. §§ 1022(a), 1024(b) (2006 ed. and Supp. III)).

³⁶ *Id.* at 1874.

³⁷ *Id.* at 1875.

trial] had raised a presumption of ‘likely harm’ suffered by the members of the relevant employee class, and . . . that CIGNA, though free to offer contrary evidence in respect to some or all of those employees, had failed to rebut that presumption[.]”³⁸ (2) “that the notices in respect to the freezing of old-plan benefits, effective December 31, 1997, were valid[.]”³⁹ (3) “the terms of the new plan’s guarantee” would be reformed so as to provide employees with both a guaranteed annuity and new plan benefits;⁴⁰ (4) that all class members would receive the guaranteed annuity plus new-plan benefits;⁴¹ and (5) that ERISA Section 502(a)(1)(B) authorized the foregoing elements of relief.⁴²

The plaintiffs and CIGNA cross-appealed the district court’s judgment to the Second Circuit.⁴³ The Court of Appeals for the Second Circuit, in a brief opinion, affirmed the district court’s ruling, commending the district court’s “well-reasoned and scholarly opinions.”⁴⁴ The parties filed cross-petitions for writs of certiorari to the U.S. Supreme Court.⁴⁵ The Court granted CIGNA’s petition “to consider whether a showing of ‘likely harm’ is sufficient to entitle plan participants to recover benefits based on faulty disclosures.”⁴⁶ The Supreme Court’s grant of certiorari certainly indicated that it would decide the applicable legal standard in determining prejudice, which was the issue decided by the Second Circuit’s 2003 decision in *Burke*

³⁸ *Id.*

³⁹ *Id.* The district court had distinguished the notice of the freezing of old-plan benefits, which was valid, from the new-plan notice, which was invalid. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* Since the district court held that it was authorized by section 502(a)(1)(B) to provide the relief it had fashioned, that court did not reach the question of whether it was also authorized to provide relief pursuant to section 502(a)(3). The district court assumed relief would not have been available as compensatory damages under section 502(a)(3) and further that section 502(a)(3) relief would not be possible where a remedy had been found under section 502(a)(1)(B). *Amara v. CIGNA Corp.* 559 F. Supp. 2d 192, 205 (D. Conn. 2008) (citing *Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572, 578 (2d Cir. 2006)).

⁴³ *CIGNA*, 131 S. Ct. at 1876.

⁴⁴ *Amara v. CIGNA Corp.*, 348 F. App’x. 627 (2d Cir. 2009).

⁴⁵ *CIGNA*, 131 S. Ct. at 1876.

⁴⁶ *Id.*

v. Kodak Retirement Income Plan.⁴⁷ Of course, the Supreme Court's opinion did much more than effectively reverse *Burke* and the other circuit courts on the requisite legal standard.⁴⁸

The entry of the U.S. Supreme Court at this juncture, in light of its prior reticence to decide this and related questions, suggests at the very least that the Supreme Court did not earlier feel compelled to resolve what became a split among the circuits on the issue of conflicts between plan documents and SPDs. In fact, as will be seen with the Second Circuit's decision in *Burke*—from which the Supreme Court refused to hear an appeal—by the time *Burke* was decided by the Second Circuit in 2003 and the Supreme Court allowed that decision to stand (in 2004), it appeared that the Supreme Court had more than intimated its position.⁴⁹ However, the Supreme Court's decision in *CIGNA* may suggest not so much a change in position as a recognition of the need to correct the lower courts' inaccurate assessments of the Supreme Court's earlier decisions. The following circuit court opinions on the question of conflicts between plan documents and SPDs, along with the issue of whether proof of reliance and prejudice (whether actual or likely) are requisite elements of successful ERISA claims, set the stage for the Supreme Court's ruling in *CIGNA*.

III. ANALYSIS OF THE APPLICABLE STANDARD, WHETHER LIKELY PREJUDICE/HARMLESS ERROR, RELIANCE, OR ACTUAL HARM, AS THE REQUIREMENT FOR RELIEF

A. Prior Circuit Court Decisions

One of the earliest of the circuit court cases was *Govoni v. Bricklayers, Masons and Plasterers International Union*,⁵⁰ in which the First Circuit held that, while the SPD did not accurately reflect the Plan, plaintiff Govoni was not entitled to relief because he was unable to “show some significant reliance upon, or possible prejudice flowing from, the faulty plan description.”⁵¹ Govoni had been a member of the union from

⁴⁷ *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 106 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004).

⁴⁸ *See generally* *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011).

⁴⁹ *See generally* *Burke*, 336 F.3d 103.

⁵⁰ 732 F.2d 250 (1st Cir. 1984).

⁵¹ *Id.* at 252.

1951 until his retirement in 1979, with a break in service between 1962 and 1966.⁵² The union amended its pension rules in 1976 (in response to the then newly enacted ERISA), and its new pension rules would have given Govoni credit for the break years that would not have figured into Govoni's pension credits under the older rules.⁵³ The First Circuit concluded that Govoni could not have relied upon, and could not be prejudiced by, a rule change that had not yet been made.⁵⁴

Additional First Circuit decisions held firmly to the requirement of reliance or prejudice. In *Bachelder v. Communications Satellite Corp.*,⁵⁵ the court ruled that an SPD provision regarding a cash payment option for employee-owned stock was ambiguous, but there could be no recovery by the employees who "did not show significant reliance or even the possibility of prejudice flowing from the SPD."⁵⁶ Several years later, the First Circuit decided *Mauser v. Raytheon Co. Pension Plan for salaried Employees.*, a case in which the plaintiff-employee, again, had made several financial decisions arguably in expectation of receiving a certain level of pension benefits.⁵⁷ The plaintiff in *Mauser* argued in the district court that he purchased a vacation home and expended funds on his daughter's wedding with the expectation of receiving certain pension benefits.⁵⁸ On appeal, the circuit court ruled that Mauser had not relied on the SPD to such an extent that it created a "measurable prejudice" and that "the mere forming of an expectation as to benefits is not enough."⁵⁹

The Fourth,⁶⁰ Seventh,⁶¹ Eighth,⁶² Tenth,⁶³ and Eleventh⁶⁴ Circuits adopted the *Govoni* rule requiring either reliance or prejudice. However, the Second,⁶⁵ Third,⁶⁶

⁵² *Id.* at 251.

⁵³ *Id.*

⁵⁴ *Id.* at 252-53.

⁵⁵ 837 F.2d 519 (1st Cir. 1988).

⁵⁶ *Id.* at 522-23 (citing *Govoni*, 732 F.2d at 252).

⁵⁷ See *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51, 53-54 (1st Cir. 2001).

⁵⁸ *Id.* at 53.

⁵⁹ *Id.* at 56 (citing *Bachelder*, 837 F.2d at 523 n.6).

⁶⁰ See *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 141 (4th Cir. 1993).

⁶¹ See *Health Cost Controls, Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999) (in which the court clarified its position on a plan-summary description conflict by stating that the plan governs unless the

and Fifth⁶⁷ Circuits rejected the rule, and the Sixth⁶⁸ and Ninth⁶⁹ Circuits did not clearly decide the issue. The *CIGNA* plaintiffs pointed to this latter group in their appeal to the U.S. Supreme Court, arguing that the more modern analysis of the Plan-SPD conflict issue of the *Burke* (Second Circuit) and *Burstein* (Third Circuit) courts should be favored.⁷⁰ After all, it was the *Burke* decision that the Supreme Court chose not to accept for appeal some years earlier.⁷¹

The *Burstein* decision was more employee-favorable than the *Burke* decision. In *Burnstein*, the district court had ruled that benefits could not possibly be recovered from a Plan based upon benefits supposedly granted pursuant to the related SPD or

employee or beneficiary has reasonably relied on the summary plan description to his detriment, indicating that both reliance and prejudice are required).

⁶² See *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 984 (8th Cir. 1992) (citing with approval *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1302 (8th Cir. 1984) (“[E]vidence of detrimental reliance must show that the plaintiff [] took action, resulting in some detriment, that [he] would not have taken had [he] known [that the terms of the plan were otherwise],’ or that he failed, to his detriment, to take action that he would have taken had he known that the terms of the plan were otherwise.”) (alteration in original) (citation omitted)).

⁶³ See *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996) (in which the court addressed not only issues of whether the employees were vested at the time the plan administrator changed the terms of the plan and whether a reservation of rights would be valid, but also that the employees could only secure relief if they had relied upon a faulty SPD or had shown prejudice arising from the inconsistency between the SPD and the Plan).

⁶⁴ See *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992).

⁶⁵ See *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 113-14 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004).

⁶⁶ See *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 380 (3d Cir. 2003).

⁶⁷ See *Rhorer v. Raytheon Eng’rs. & Constructors, Inc.*, 181 F.3d 634, 644 n.12 (5th Cir. 1999).

⁶⁸ See, e.g., *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 247 (6th Cir. 1996).

⁶⁹ See generally *Bergt v. Ret. Plan for Pilots Employed by MarkAir, Inc.*, 293 F.3d 1139 (9th Cir. 2002).

⁷⁰ See *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1881-82 (2011); see also *Burnstein*, 334 F.3d at 376-78 (discussing conflict between terms of the SPD and terms of the Plan Document); *Burke*, 336 F.3d at 110 (“Where the terms of a plan and the SPD conflict, the SPD controls.”).

⁷¹ See *Kodak Ret. Income Plan v. Burke*, 540 U.S. 1105 (2004).

other secondary documents.⁷² The Third Circuit, in reversing the district court, stated, “Today, we join with the other Courts of Appeals that have considered this issue, and hold that, where a summary plan description conflicts with the plan language, it is the summary plan description that will control.”⁷³ Furthermore, a claimant seeking plan benefits need not plead nor prove reliance upon the SPD,⁷⁴ or upon such other secondary document as may have contained the conflicting benefit information (as the Third Circuit did not restrict its holding to SPDs alone).⁷⁵ The “other Courts of Appeals” to which the *Burstein* court referred were those of the Fourth,⁷⁶ Fifth,⁷⁷ Ninth,⁷⁸ and Eleventh Circuits.⁷⁹

Compared to the *Burstein* court, the *Burke* court was somewhat less generous to employees and plan beneficiaries. While the Second Circuit apparently agreed with the district court’s finding that reliance was not an essential element of proof and recovery, the Second Circuit ruled that recovery would require prejudice, but that a contradictory SPD creates prejudice as a matter of law.⁸⁰ The court provided additional context to its prejudice requirement: “Cognizant of ERISA’s distribution of benefits, we require, for a showing of prejudice, that a plan participant or beneficiary was *likely* to have been harmed as a result of a deficient SPD.”⁸¹ The Second Circuit further expanded on its ruling by at least indirectly pointing to the need for some injury or damage to the plaintiff before a recovery can be awarded,

⁷² See *Burstein*, 334 F.3d at 373-74.

⁷³ *Id.* at 378. See generally *Barker v. Ceridian Corp.*, 122 F.3d 628 (8th Cir. 1997); *Chiles v. Ceridian Corp.*, 95 F.3d 1505 (10th Cir. 1996); *Atwood v. Newmont Gold Co.*, 45 F.3d 1317 (9th Cir. 1995); *Pierce v. Sec. Trust Life Ins. Co.*, 979 F.2d 23 (4th Cir. 1992); *Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050 (7th Cir. 1991); *Hansen v. Cont’l Ins. Co.*, 940 F.2d 971 (5th Cir. 1991); *Heidgerd v. Olin Corp.*, 906 F.2d 903 (2d Cir. 1990); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134 (6th Cir. 1988); *McKnight v. S. Life & Health Ins. Co.*, 758 F.2d 1566 (11th Cir. 1985).

⁷⁴ *Burstein*, 334 F.3d at 380.

⁷⁵ *Id.*

⁷⁶ See *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 140 (4th Cir. 1993).

⁷⁷ *Hansen v. Cont’l Ins. Co.*, 940 F.2d 971, 981-82 (5th Cir. 1991).

⁷⁸ *Atwood*, 45 F.3d at 1321.

⁷⁹ *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515 (10th Cir. 1996).

⁸⁰ *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 111-12 (2d Cir. 2003).

⁸¹ *Id.* at 113 (emphasis in original).

stating that “the employer may rebut [the likelihood of prejudice] through evidence that the deficient SPD was in effect a harmless error.”⁸²

When the Supreme Court elected not to take the *Burke* appeal, it left in place several elements: first, an employee or plan beneficiary could present a claim based upon an SPD or other summary document that conflicted with the Plan itself;⁸³ second, the employee or plan beneficiary would be required to show prejudice;⁸⁴ third, the standard of proof for a showing of prejudice was that the employee or plan beneficiary was likely to have been harmed as a result of the deficient SPD (or other summary document);⁸⁵ fourth, proof of actual harm was not required;⁸⁶ fifth, reliance by the employee or plan beneficiary upon the SPD was unnecessary;⁸⁷ but, sixth, the employer could defend a claim by an affirmative showing that the employee or plan beneficiary had not suffered actual harm, i.e., the erroneous summary plan description was harmless.⁸⁸

B. *CIGNA v. Amara*

The Second Circuit had not yet had the opportunity to render these conclusions when CIGNA converted its defined-benefit retirement plan to a new and different “cash balance account” plan in 1998.⁸⁹ Although, by 1998, it was reasonably clear from the various circuit court opinions that SPDs would be the operative documents only when there was a conflict with the terms of the Plan, it was unclear what a plaintiff would be required to prove in order to prevail, i.e., regarding reliance, prejudice, and likely or actual injury.⁹⁰ It was also clear by 1998

⁸² *Id.*

⁸³ *See id.* at 110.

⁸⁴ *Id.* at 111-12.

⁸⁵ *Id.* at 113-14.

⁸⁶ *See id.*

⁸⁷ *Id.* at 112.

⁸⁸ *Id.* at 113.

⁸⁹ *See CIGNA Corp., v. Amara*, 131 S. Ct. 1866, 1870 (2011).

⁹⁰ *See, e.g., Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 247 (6th Cir. 1996).

that plan modifications did not create ERISA violations so long as the modifications were made in accordance with ERISA and in a timely manner.⁹¹

CIGNA's plan changes did, however, create a situation in which vested benefits might be reduced.⁹² Moreover, notices of those changes, through the newsletter or otherwise, were untimely and erroneous.⁹³ The Supreme Court found no reason to disturb the factual findings made by the district court regarding timeliness (or lack thereof) and employer-generated misinformation.⁹⁴ The Supreme Court cited with approval the conclusions of the district court regarding the underlying facts of the case and CIGNA's violation of ERISA Sections 102(a), 104(b), and 204(h).⁹⁵

The Supreme Court limited its review of the underlying case to two issues: first, "whether the District Court applied the correct legal standard, namely a 'likely harm' standard, in determining that CIGNA's notice violations caused its employees sufficient injury to warrant legal relief,"⁹⁶ and second, "whether the ERISA section . . . mentioned (ERISA's recovery-of-benefits-due provision, section 502(a)(1)(B)) authorizes entry of the relief the District Court provided."⁹⁷ While the Supreme Court answered both of these questions in the negative, seemingly finding in favor of CIGNA, the Court offered an alternative basis for relief, namely, section 502(a)(3),

⁹¹ See, e.g., *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 934 (5th Cir. 1993) ("It is undisputed that nothing in ERISA requires an SPD to reference amendment rights or procedures."). The court found that plan administrators are free to amend the terms of plans, even if the benefits to non-vested employees are diminished or deleted, so long as the administrators follow the ERISA-prescribed scheme for doing so, and so long as vested benefits are not touched. *Id.*

⁹² See *CIGNA*, 131 S. Ct. at 1873.

⁹³ *Id.* at 1872-73.

⁹⁴ See *id.* at 1871.

⁹⁵ *Id.* ("[T]he interested reader can find a more thorough description [of the circumstances] in two District Court opinions, which set forth that court's findings reached after a lengthy trial." (citations omitted)); see also *id.* at 1874 ("The District Court concluded, as a matter of law, that CIGNA's representations (and omissions) about the plan, made between November 1997 (when it announced the plan) and December 1998 (when it put the plan into effect) violated: (a) ERISA § 204(h) . . . and (b) ERISA §§ 102(a) and 104(b).").

⁹⁶ *Id.* at 1871.

⁹⁷ *Id.* at 1871. The Supreme Court, in addressing these two issues, would essentially also decide whether detrimental reliance is a necessary consideration.

and remanded the case.⁹⁸ When the answer to the latter issue is linked with those aspects of the district court’s opinion that the Supreme Court left undisturbed, the Supreme Court’s decision presents a mixed bag of results for both sides to this dispute. What the district court does on remand will more likely define the favored party.

IV. SECTION 502(A)(3) RATHER THAN SECTION 502(A)(1)(B) IS THE APPROPRIATE ERISA SECTION FOR INDIVIDUALIZED EQUITABLE RELIEF

The district court secured relief for the CIGNA employees and plan beneficiaries by using section 502(a)(1)(B) to reform the Plan and then ordering the plan administrator (CIGNA) to provide benefits in accordance with the reformed plan, but the Supreme Court rejected any authority existing pursuant to section 502(a)(1)(B) to change a plan.⁹⁹ “That provision states that a ‘civil action may be brought’ by a plan ‘participant or beneficiary . . . to recover benefits due to him under the terms of his plan.’”¹⁰⁰ However, there is nothing in that section that authorizes a plan reformation.¹⁰¹ Reformation, if possible, would need to be based upon some other section of ERISA.¹⁰² The Supreme Court reasoned further that the recovery of benefits due under a “plan” means just that; that is, the Plan and not the SPD contains the benefits due.¹⁰³ Section 502(a)(1)(B) can be used to enforce the terms of the Plan but not the terms of the SPD:

[W]e cannot agree that the terms of statutorily required plan summaries (or summaries of plan modifications) necessarily may be enforced (under § 502(a)(1)(B)) as the terms of the plan itself. . . . [T]he information *about* the plan provided by those disclosures [in summary plan descriptions] is not itself *part of* the plan. Nothing in §

⁹⁸ *Id.*; ERISA § 502(a)(3), 29 U.S.C. 1132(a)(3) (2006).

⁹⁹ *CIGNA*, 131 S. Ct. at 1871, 1878.

¹⁰⁰ *Id.* at 1875-76.

¹⁰¹ *Id.* at 1878.

¹⁰² *See Id.*

¹⁰³ *Id.* at 1877.

502(a)(1)(B) (or, as far as we can tell, anywhere else) suggests the contrary.¹⁰⁴

The district court's award, based upon the plan as reformed, could not be approved if section 502(a)(1)(B) does not provide the authority for a court to reform a plan in the first instance.¹⁰⁵ Without any authority found in section 502(a)(1)(B) to reform the plan, and concluding that the SPD (and other descriptive documents, such as the CIGNA newsletter) is not the Plan, the Supreme Court looked elsewhere for the statutory support upon which the district court might base a decision providing relief to the CIGNA employees and the plan beneficiaries.¹⁰⁶ The Supreme Court found this support in section 502(a)(3).¹⁰⁷ That section authorizes a civil action to be filed by a participant, a beneficiary, or an administrator to obtain other appropriate equitable relief to redress violations of ERISA or to enforce any provisions of a plan's terms.¹⁰⁸ This would include a claim for breach of fiduciary duty.¹⁰⁹

The district court had not utilized section 502(a)(3) because it determined that a remedy for the plaintiffs could be found in section 502(a)(1)(B) and because the scope of section 502(a)(3) had been narrowed.¹¹⁰ The district court likely assumed that *Mertens v. Hewitt Associates*,¹¹¹ a 1993 Supreme Court decision, precluded an award of compensatory damages because "categories of relief that were *typically* available in equity" are limited to such classic equitable remedies as injunction,

¹⁰⁴ *Id.* (emphasis in original) (citations omitted).

¹⁰⁵ *Id.* at 1871.

¹⁰⁶ *Id.* at 1878. The Supreme Court's majority opinion could have ended with the determination that section 501(a)(1)(B) simply does not provide the authority to provide the relief allowed by the district court. As Justice Scalia noted in his concurring opinion, with which Justice Thomas joined, "Why the Court embarks on this peculiar path is beyond me." *Id.* at 1884 (Scalia, J., concurring). Justice Scalia then refers to the majority's section 502(a)(3) discussion as "blatant dictum." *Id.* (Scalia, J., concurring).

¹⁰⁷ *Id.* at 1871, 1878-80.

¹⁰⁸ *Id.* at 1876.

¹⁰⁹ *Id.* at 1881. See also *Varity Corp. v. Howe*, 516 U.S. 489, 510-513 (1996).

¹¹⁰ *CIGNA*, 131 S. Ct. at 1876.

¹¹¹ 508 U.S. 248 (1993).

mandamus, or restitution.¹¹² Compensatory damages would not be available in equity.¹¹³ However, in *Mertens*, the plan participants had brought suit against a non-fiduciary actuary who had been involved with the plan fiduciary in that fiduciary's ERISA violation.¹¹⁴ The plaintiffs brought suit pursuant to section 502(a)(3) to recover the monetary loss suffered by the plan.¹¹⁵ They did not base their claim upon section 502(a)(2) because that section was applicable to fiduciaries and not to a non-fiduciary such as Hewitt Associates.¹¹⁶ The Supreme Court, in limiting relief available under section 502(a)(3) to those remedies typically available in equity (thus not monetary damages), and further in not identifying alternative sections under which monetary relief might be available,¹¹⁷ generated years of misinterpretation, or at least non-understanding, of the full range of remedies available under ERISA. The Court in *Mertens* gave little direction to the lower courts in how to fashion equitable relief so that a reasonable interpretation of *Mertens* would be the non-availability of monetary relief, rather than a roadmap of how to structure equitable relief.¹¹⁸

Almost ten years after the Court's decision in *Mertens*, the Supreme Court was again asked, in *Great-West Life & Annuity Insurance Co. v. Knudson*,¹¹⁹ to identify the nature of equitable relief available to a plaintiff under section 502(a)(3). In *Great-West*, the plaintiff health insurance company sought reimbursement from its insured from an underlying personal injury lawsuit recovery.¹²⁰ Justice Scalia, writing for the majority, qualified the insurance company's claim as "the kind of restitution . . . that . . . is not equitable," as was claimed by Great-West.¹²¹ Relief was therefore

¹¹² *Id.* at 256 (emphasis in original).

¹¹³ *Id.*

¹¹⁴ *Id.* at 250.

¹¹⁵ *Id.* at 253.

¹¹⁶ *Id.* at 252-53.

¹¹⁷ *See id.* at 256-58.

¹¹⁸ *See id.*

¹¹⁹ 534 U.S. 204 (2002).

¹²⁰ *Id.*

¹²¹ *Id.* At 214.

unavailable as “other equitable relief” under section 502(a)(3).¹²² “[F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant’s possession.”¹²³ Justice Scalia proceeded to explain this distinction between law and equity by reference to recognized standard texts on equity and to the Restatements.¹²⁴ While the Court’s explanation may have been necessary in response to the nature of the claim brought by Great-West, Justice Scalia’s references to the current treatises on equity and trust law may not have created the kind of roadmap needed by the lower courts.

As an example of the continuing difficulty faced by the lower courts in deciding whether a suit is one at law or in equity, the Second Circuit in *Pereira v. Farace*,¹²⁵ in determining whether a jury trial was guaranteed by the Seventh Amendment, stated:

First, we ask “whether the action would have been deemed legal or equitable in 18th century England.” Second, “we examine the remedy sought and determine whether it is legal or equitable in nature.” We then “balance the two, giving greater weight to the latter.” . . . After three decades of grappling with the law versus equity analysis, the late Justice William Brennan threw up his hands. He had wearied of “rattling through dusty attics of ancient writs” and suggested that Seventh Amendment jurisprudence should sever its dependence on historical analogies to English common law as it existed in 1791. However much we may sympathize with his position, Justice Brennan’s suggestion has gone unheeded, and thus, we are left to scour through the “dusty attics” ourselves.¹²⁶

Notwithstanding the apparent confusion that was generated by *Mertens* and *Great-West*, Justice Breyer quickly distinguished those cases as being outside the realm of trust law and therefore being claims strictly for monetary relief.¹²⁷ Justice Breyer’s opinion in *CIGNA* reiterates the distinction:

¹²² *Id.* at 218.

¹²³ *Id.* at 214.

¹²⁴ *Id.* at 213-14.

¹²⁵ 413 F.3d 330 (2d Cir. 2005).

¹²⁶ *Id.* at 337-38 (citations omitted).

¹²⁷ *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1878-79 (2011).

The case before us concerns a suit by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust). It is the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity, not a court of law. With the exception of the relief now provided by § 502(a)(1)(B), the remedies available to those courts of equity were traditionally considered equitable remedies.¹²⁸

While reformation is a recognized equitable remedy, it is not authorized by section 502(a)(1)(B).¹²⁹ The district court, therefore, did not have the authority pursuant to section 502(a)(1)(B) to fashion the relief it granted.¹³⁰ Only section 502(a)(3) would authorize the kind of relief made available by the district court, and if the district court had distinguished *CIGNA* from *Mertens*, it would likely have utilized this section in granting relief.¹³¹ Justice Breyer calls attention to the current but traditional texts in directing the lower court in determining what, if any, “appropriate equitable relief” might be available to plaintiffs such as those in *CIGNA*.¹³² While Justice Breyer did not dictate the choice of remedies, he did offer one specifically as a possible other equitable remedy, namely, surcharge.¹³³ Consequently, even though the availability of section 502(a)(3) was not presented on appeal to the Supreme Court in *CIGNA*, and even though surcharge was not presented as a possible form of relief by the appellants or briefed by the parties, the applicability of section 502(a)(3) was discussed in depth at oral argument and the concept of surcharge was raised by the majority.¹³⁴ The majority opinion, without the approval of Justices Scalia and Thomas, provides clear direction to the lower

¹²⁸ *Id.* at 1879 (citations omitted).

¹²⁹ *See* ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2006).

¹³⁰ *CIGNA*, 131 S. Ct. at 1878. *See generally* ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2006).

¹³¹ *CIGNA*, 131 S. Ct. at 1882. *See generally* ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2006); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993).

¹³² *See CIGNA*, 131 S. Ct. 1878-80.

¹³³ *Id.* at 1880.

¹³⁴ *See generally id.*

courts as to where they might find a conceptual basis for “other appropriate equitable relief.”¹³⁵

Justices Scalia and Thomas may have correctly characterized the majority opinion related to section 502(a)(3) as “blatant dictum,” but it was possibly the Supreme Court itself that created the circumstances that now explain and justify the Court’s extended reasoning in *CIGNA*.¹³⁶ After all, the Supreme Court in 2004 denied certiorari in *Burke* when the “likely harm” standard could have been rejected.¹³⁷ Likewise, *Mertens*, *Great-West*, and numerous other cases¹³⁸ presented the Supreme Court with the opportunity to clarify once and for all (1) what kind of relief is available under section 502(a)(1)(B), (2) that recovery under that section is restricted to reimbursing the “trust,” and (3) whether section 502(a)(3) authorizes the “trust” and individual plan participants to secure “make-whole relief.”¹³⁹

A. Actual Harm, But Without Detrimental Reliance, is Required Under Section 502(a)(3)

The precedent-creating Second Circuit case since 2004 is *Burke*.¹⁴⁰ That case set forth the standard that recovery of benefits pursuant to an ERISA-governed Plan requires a showing of prejudice to the employee, but such prejudice would exist, as a matter of law, when an SPD conflicts with the Plan.¹⁴¹ Prejudice would be

¹³⁵ See *id.* at 1878-80.

¹³⁶ See *id.* at 1884.

¹³⁷ See *Kodak Ret. Income Plan v. Burke*, 540 U.S. 1105 (2004).

¹³⁸ See generally Susan Harthill, *A Square Peg in a Round Hole: Whether Traditional Trust Law “Make-Whole” Relief is Available Under ERISA Section 502(a)(3)*, 61 OKLA. L. REV. 721 (2008) (discussing *Amschwand v. Spherion Corp.*, 128 S. Ct. 2995 (2008)). This article, with its analysis of *Amschwand* and the Supreme Court decisions leading up to the denial of certiorari in that case (at issue was “whether a participant or beneficiary in an employee welfare benefit plan is entitled to individualized monetary relief for losses caused by a fiduciary breach”), contains a review of trust law principles and suggests that the application of trust law principles to section 502(a)(3) litigation is far more complicated than was implied by Justice Scalia in *Great-West* (Justice Breyer’s opinion in *CIGNA* would probably also have been similarly referenced by Professor Harthill had it been issued by the time of publication). *Id.* at 721.

¹³⁹ See generally ERISA §§ 502(a)(1)(B), 502(a)(3), 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(3) (2006).

¹⁴⁰ See generally *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004).

¹⁴¹ *Id.* at 111-13.

demonstrated upon a showing that the employee was *likely* to suffer harm,¹⁴² proof of actual harm was not required.¹⁴³ Conflicting terms of the SPD would then be enforced by the court.¹⁴⁴ The *CIGNA* opinion changes *Burke*, and all other contrary circuit court decisions, and provides a set of guidelines as to the proof required of a plaintiff.¹⁴⁵

The first guideline tells us that the Plan Document contains the terms of the Plan;¹⁴⁶ everything else simply contains information about the Plan.¹⁴⁷ If there is a conflict between the terms of the Plan and the terms of any other document that describes the Plan, a court should look to section 502(a)(3) to fashion a resolution of the dispute.¹⁴⁸ Section 502(a)(3) is an equitable remedy provision and is interpreted in accordance with general principles of equity law.¹⁴⁹ “We have interpreted the term ‘appropriate equitable relief’ in section 502(a)(3) as referring to ‘those categories of relief’ that, traditionally speaking (i.e., prior to the merger of law and equity) ‘were typically available in equity.’”¹⁵⁰ The Supreme Court, citing prominent equity authors and their works,¹⁵¹ concluded that detrimental reliance, while a necessary element in an estoppel case, “is not always necessary for other equitable remedies.”¹⁵² For example, contract reformation would not require detrimental reliance where a trustee breaches his duties to the trust.¹⁵³ A court would order the trust made whole without regard to the question of reliance.¹⁵⁴ But, in such an instance, the court would make

¹⁴² *Id.* at 113.

¹⁴³ *See id.*

¹⁴⁴ *See Id.*

¹⁴⁵ *See generally* *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011).

¹⁴⁶ *See id.* at 1877.

¹⁴⁷ *See id.*

¹⁴⁸ *See* ERISA § 502(a)(3), 29 U.S.C. §1132(a)(3) (2006); *CIGNA*, 131 S. Ct. at 1878-80.

¹⁴⁹ *See* ERISA § 502(a)(3), 29 U.S.C. §1132(a)(3) (2006); *CIGNA*, 131 S. Ct. 1878-80.

¹⁵⁰ *CIGNA*, 131 S. Ct. at 1878 (quoting *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006)).

¹⁵¹ *Id.* at 1881.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

the trust whole to the extent the trust was harmed.¹⁵⁵ In other circumstances as well, equity would seem logical when it does not require making whole that which had not been diminished in some way.¹⁵⁶

Recognizing harm and calculating its extent will vary based not only upon the circumstances by which the harm was caused, but also upon the individuals who fell victim to the harm.¹⁵⁷ The Supreme Court recognized the difficulty and uncertainty of enforcing the equitable powers of the court in the absence of clarity in ERISA.¹⁵⁸ “The relevant substantive provisions of ERISA do not set forth any particular standard for determining harm. They simply require the plan administrator to write and to distribute written notices that are ‘sufficiently accurate and comprehensive to reasonably apprise’ plan participants and beneficiaries of ‘their rights and obligations under the plan.’”¹⁵⁹ Plan participants and beneficiaries would, however, seemingly be required to prove some degree of actual harm based upon traditional *standing* rules: “To have standing, Appellants must suffer an actual harm by the loss of a legally protected interest; there must be a causal connection between the injury and the conduct complained of; and it must be likely that the injury will be ‘redressed by a favorable decision’ by the court.”¹⁶⁰ If a claimant cannot demonstrate some individualized harm, there must be evidence of a deprivation of a right as a result of a breach of fiduciary duty conferred by ERISA.¹⁶¹

While the Supreme Court has thus dispensed with the requirement of detrimental reliance, which many of the circuits had previously determined to be a requisite for successfully challenging the conflicting terms of a Plan, it has mandated the requirement of actual harm, rather than the lesser standard of likely harm.¹⁶² The opinion of the Court only briefly touches upon the basis for the conclusion that

¹⁵⁵ *See id.*

¹⁵⁶ *See id.*

¹⁵⁷ *See id.*

¹⁵⁸ *See generally id.*

¹⁵⁹ *Id.* at 1881.

¹⁶⁰ *Schultz v. Windstream Commc'ns, Inc.*, 600 F.3d 948, 952 (8th Cir. 2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

¹⁶¹ *See Kendall v. Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 118-19 (2d Cir. 2009).

¹⁶² *CIGNA*, 131 S. Ct. at 1881-82.

there must be a showing of actual harm.¹⁶³ The Court analogizes an award under section 502(a)(3) as a “surcharge” similar to a surcharge imposed upon a trustee following the trustee’s breach of trust.¹⁶⁴ “To be sure, just as a court of equity would not surcharge a trustee for a nonexistent harm, a fiduciary can be surcharged under § 502(a)(3) only upon a showing of actual harm-proved (under the default rule for civil cases) by a preponderance of the evidence.”¹⁶⁵ The Supreme Court thus made clear that claims for equitable relief under section 502(a)(3) will require proof of actual harm.¹⁶⁶

With regard to the CIGNA plan participants, the lower court will now analyze the specific losses to be suffered by those participants and, now unconstrained by the misinterpretation of the relief available under section 502(a)(3), will be able to identify compensatory damages and perhaps also reform the CIGNA Plan.

B. Surcharge

The Court’s introduction of this concept of “surcharge” is itself somewhat intriguing. It had not been argued by the parties in their briefs, nor was it addressed in oral argument before the Court.¹⁶⁷ Yet, it is this rationale for the allowance of equitable relief that the Court initiates before sending the case back to the lower court for further proceedings, presumably to decide whether a surcharge is to be ordered and, if so, how it is to be calculated.¹⁶⁸ The Court looked back to its 1939 decision in *Princess Lida of Thurn and Taxis v. Thompson*¹⁶⁹ for its offer of a “surcharge” as a possible equitable remedy.¹⁷⁰ Interestingly, the Court barely touched upon the

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1881 (citing G. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 861 (rev. 2d ed. 1995)).

¹⁶⁵ *Id.* at 1881 (citation omitted).

¹⁶⁶ *See id.* at 1881-82.

¹⁶⁷ *See generally* Transcript of Oral Argument, *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011) (No. 09-804), 2010 WL 4859511; Brief for Petitioner, *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011) (No. 09-804), 2010 WL 831182; Brief for Respondent, *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011) (No. 09-804), 2010 WL 500088.

¹⁶⁸ *CIGNA*, 131 S. Ct. at 1881-82.

¹⁶⁹ 305 U.S. 456 (1939).

¹⁷⁰ *CIGNA*, 131 S. Ct. at 1880.

concept in that case.¹⁷¹ The Supreme Court affirmed a decision of the Pennsylvania Supreme Court that had addressed a jurisdictional question and in so doing adopted the following statement:

An accounting by fiduciaries is in itself a proceeding quasi in rem, in the sense that it not only adjudicates the legality of the investments constituting the trust, but also, if it results in a surcharge, orders payment and restoration of moneys to the trust fund, that is, to the res. [Such] a surcharge is not a judgment to pay money to individuals as in an ordinary personal injury action. . . . [I]n other words, the recovery would be by the trust fund and not by appellants, who can gain therefrom only upon distribution of the income and ultimately of the corpus of the trust, as prescribed in the agreement by which it was created.¹⁷²

Justice Breyer's reference to "surcharge" clearly offers the possibility that an individual plaintiff may sue a fiduciary for monetary damages under section 502(a)(3) as "other appropriate equitable relief."¹⁷³ This provides clarification of what was previously treated as a section 502(a)(2) restoration of funds to a trust and not made available for individual victims of a trustee's breach of fiduciary duties.¹⁷⁴ Justice Breyer's discussion recognizes that "[a]n action by beneficiaries for a breach of trust is an equitable proceeding, even if money damages are the only remedy sought."¹⁷⁵

While Justice Breyer's reference to "surcharge" in the *CIGNA* opinion is brief, its impact may be significant. It confirms what some commentators had already argued, that is, that surcharge is available to individuals as equitable relief under section 502(a)(3).¹⁷⁶ Perhaps the most extensive discussion on the question of "surcharge" (and "make-whole" relief) is contained in Professor Harthill's article reviewing the *Amschwand* case.¹⁷⁷ Her review of the pertinent Restatement of Trust

¹⁷¹ See *Lida*, 305 U.S. at 463-64.

¹⁷² *Thompson v. Fitzgerald*, 198 A. 58, 66 (Pa. 1938); *aff'd by Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939).

¹⁷³ *CIGNA*, 131 S. Ct. at 1876, 1878, 1880 (citing 29 U.S.C. § 1132 (2006)).

¹⁷⁴ See *Id.* at 1878-79.

¹⁷⁵ 76 AM. JUR. 2D *Trusts* § 598 (2011).

¹⁷⁶ See *infra* notes 183-88.

¹⁷⁷ Harthill, *supra* note 138, at 723-24.

provisions, the Uniform Trust Code of 2000, and the leading trust treatises will surely inform litigants in future ERISA cases.¹⁷⁸ She attributes much of the confusion in past district and circuit court decisions to the confusing literature that interchangeably references the concepts of surcharge, compensatory damages, accounting, and make-whole relief.¹⁷⁹ While the *CIGNA* decision may not have fleshed out the elements of surcharge—after all, this was *dictum*—it has crystallized the issue for the lower courts. As Professor Harthill stated, “It is absurd to think that Congress would have extended the substantive duties and obligations of a trustee to ERISA plan fiduciaries but at the same time limit the remedies available under traditional trust law to those situations where the trust corpus is harmed,”¹⁸⁰ and “[c]ertainly, relief for loss to the plan is payable to the plan under ERISA sections 409 and 502(a)(2).”¹⁸¹ “Relief for these types of cases would, therefore, be payable to the trust corpus. But the availability of relief payable back into the trust corpus does *not* foreclose the availability of relief to the individual beneficiary, as pre-fusion cases evidence, and which is reflected in ERISA Section 502(a)(3).”¹⁸²

V. CONCLUSION

If the Supreme Court’s acceptance of what was essentially *CIGNA*’s request for appeal was thought to lead to a final resolution of the issues presented in that litigation, and, at the same time, the resolution of the various circuit court approaches to SPD anomalies, the Court’s opinion and its remand to the lower court should dampen those thoughts. The Court clarified that section 502(a)(1)(B) will not serve as the basis for individual relief in response to employer (plan administrator) violations of ERISA Sections 102(a) and 104(b). However, the Court has not clarified the applicability of section 502(a)(1)(B) to section 204(h) violations, which was not argued before the Supreme Court.

The Court has also resisted a one-size fits all mentality. Its focus on the plaintiffs of this claim, and its acknowledgement of the “flexible approach” of

¹⁷⁸ *See id.* at 754-71.

¹⁷⁹ *Id.* at 751-52.

¹⁸⁰ *Id.* at 764.

¹⁸¹ *Id.* at 782 (emphasis removed).

¹⁸² *Id.* (emphasis in original).

equity,¹⁸³ suggests that the Court will be open to a variety of lower court decisions applicable only to the plaintiffs therein and ultimately not easily reviewable other than for abuse of discretion because they will be uniquely fact-sensitive. Perhaps the next set of appeals will be just that, whether the lower court abused its discretion in fashioning appropriate equitable relief.

If we examine the Court's clear statements, together with those issues that the Court chose not to address and therefore left undisturbed, we should be able to identify some conclusions:

- 1) The plan administrator must act in a timely manner. Plans may be changed, assuming they do not contain prohibitions against change and so long as the changes do not affect vested rights, but timely notice of any changes must be given. Any permissible changes must be prospective, not retroactive, and explained in advance of the changes taking effect.
- 2) The Plan is not anything other than the Plan. All materials and communications about the Plan would fall under the category of SPDs. Plan administrators should therefore restrict their summary plan descriptions and related communications to as few documents as possible, perhaps only a single SPD, and seek and receive pertinent compliance reviews confirming that any and all secondary documents and communications do not add to, or alter, plan terms, unless the additions and alterations are in fact desired. Careful analysis should be made regarding whether any communication will result in a change of benefit and which employees and other plan beneficiaries will be affected by the change.
- 3) The employer should resist issuing communications to employees and plan beneficiaries regarding the ERISA-governed Plan. All communications should emanate from the plan administrator. Internally, the employer's human resource manager and the company's general counsel should jointly review all communications, proposals, and explanations. Employees and plan beneficiaries, as a matter of course, should preserve all communications regarding their plans. Even cover letters may be instrumental in establishing ERISA violations.
- 4) The new "no reliance but actual harm required" standard resolves the dispute among the circuits that has existed since the circuit courts began reviewing such

¹⁸³ *CIGNA*, 131 S. Ct. at 1881 (citing *BOGERT*, *supra* note 164, § 861) ("In such instances equity courts would 'mold the relief to protect the rights of the beneficiary according to the situation involved.'").

issues. Employers and plan administrators with multi-jurisdictional plans now enjoy a more uniform treatment of violations and remedies.

5) Employees who do not suffer actual harm will have no reason to institute legal action, and there will likely be fewer situations in which class actions would be the appropriate form in which to bring suit. In those cases in which classes may be recognized, they might in fact be smaller and more focused in the requested relief. Equity may call for a variety of remedies within the same class.

6) The availability of equitable relief for individual claims based upon section 502(a)(3) is clear, whether made through reformation, restitution, or surcharge, but what will be “appropriate” in given circumstances remains uncertain. The availability and application of equitable remedies will be determined by trust law principles, and reference to the leading trust law authors will be expected.

7) While much of the Court’s opinion consists of *dicta*, a reasonable expectation is that such *dicta* will be followed in trial and lower appellate courts in the future.¹⁸⁴

The Supreme Court itself seems to be doing equity. First, it balanced a strict reading of the pertinent ERISA provisions with a generous degree of advisory opinion. Second, it balanced the rights of employees to be given timely and accurate information against the right of an employer not to be held to account for harmless and unintended mistakes. Third, it balanced the right of employees and plan beneficiaries to be secure in their vested benefits against the need and right of an employer to amend a plan. Fourth, it balanced the right of an employer to make and change ERISA-governed plans in accordance with its statutory right against the rights of employees to make certain that the employer’s statutory rights are properly exercised. Finally, it vested the lower courts with the authority to construct appropriate equitable remedies for violations of ERISA-governed plans, but did not dictate what those remedies must be. Courts now seem to have the flexibility and discretion to fashion appropriate equitable relief, including money damages, under section 502(a)(3). What remains to be seen is whether the Supreme Court, in so doing, has set the stage for more litigation and the likelihood that additional interpretation of section 502(a)(3) will be needed.

¹⁸⁴ See 20 AM. JUR. 2D *Courts* § 134 (2011).