

Lurie on Cigna v. Amara: What Makes this Supreme Court Case Potentially So Significant?

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It seems to me that the majority opinion in this case poses an even larger question: has the Court now taken a second large step towards loosening the tight-knit set of enforcement provisions that Congress crafted with such precision in section 502 of ERISA, where it spelled out with exquisite care the permissible civil actions for enforcing the requirements of ERISA, specifying not just the harms proscribed and the corresponding remedies (e.g., recovery of lost benefits, injunctions, breach of fiduciary suits, clarifications of future benefits, other appropriate equitable relief), but also who may bring the remedial actions (for some causes, participants and beneficiaries, for others, the plan, for another, the Secretary of Labor along with participants, beneficiaries and fiduciaries). Congress obviously did not intend to allow free rein for claimants to pick and choose among all the available remedies, or to make multiple choices.”

Al Lurie has never been one to mince words. This pension guru and maven (not to mention former Assistant IRS Commissioner: Employee Benefits & Exempt Organizations) and General Editor of *Federal Income Taxation of Retirement Plans* (LexisNexis 2008), shares with **LISI** members his thoughts on the recent Supreme Court case *CIGNA Corp. et al. v. Amara et al.*

Here is Al's commentary.

EXECUTIVE SUMMARY:

The unanimous CIGNA decision handed down by the Supreme Court on May 16th did not have the trappings of a cause célèbre, just a holding that misstatements in the plan summary plan description (SPD) did not provide

grounds for a recovery at law. The 6-2 division of the Court did not pertain to the SPD issue. A surprising holding to some, perhaps, but not earth-shaking.

But the majority opinion will cast a long shadow. And it may foretell a breakdown in the exquisitely detailed and compartmentalized provision of civil remedies available for the enforcement of ERISA's "reticulated" provisions, to recall the Supreme Court's eloquent term for ERISA on one of its first encounters with the statute in the leading Nachman case.

Is this an outcome that will advance justice or introduce chaos and confusion.? Which Justice – living or dead – offers a clue?

FACTS:

Introduction

On the face of it, the recent Supreme Court decision in CIGNA would appear not very important, as pension cases go, certainly not as cash balance plan cases go. See [Employee Benefits and Retirement Planning Newsletter #433](#). Nothing like the stir the IBM case made eight years ago when decided, not even at the Temple of Justice in Washington, but at a lowly district court in southern Illinois. See [Employee Benefits and Retirement Planning Newsletter #378](#).

At the surface level, all the CIGNA decision seems to establish is that, in a suit to recover pension benefits under the governing ERISA remedy section, the summary plan description cannot be relied upon to establish a right to plan benefits as if it were the plan itself.

That may come as a surprise to some pension practitioners, who have come to accept the learning of several cases that the SPD can supersede the plan language in some circumstances; but it is not of earth-shaking significance. Indeed, the proposition was so obvious to the entire bench of the High Court that participated in the consideration of this case (eight Justices, the latest appointee having not participated), that they did not even cite those cases or note their existence; and, as will momentarily appear, they even summarily swept aside the U.S. Solicitor General's contrary arguments in the case, as amicus.

But, as we shall see, the decision is, in point of fact, considerably more important than just a garden variety pension case, and was so viewed by the Justices. How else explain the extremely robust and scholarly opinions written by their authors for the majority and concurring Justices, replete with copious citations to treatises and cases from the English and American jurisprudence, some going back to the 19th century.

The case also obviously ignited strong passions among the members of the Court. One can only imagine the ruckus stirred in the presumably normally quiet chambers of the Justices as they discussed the case, that was such as to inspire Justice Scalia, in his concurring opinion, to sharply criticize the majority opinion of Justice Breyer in what, even for him, was unusually strident prose.

All of this is even more surprising in a case in which the holding was unanimous, albeit not the reasoning, hence, a 6-2 split between the signers of the majority and concurring opinions.

The Court unanimously denied the plaintiffs' suit to recover benefits they claimed under the terms of the plan in which they were participants. (The case had been certified as a class action, so the named plaintiffs sued individually and on behalf of all others similarly situated.) Suit was initiated under the section of ERISA (502(a)(1)(B)) that provides an action may be brought by a participant "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

The benefits involved had accrued under a traditional defined benefit plan, which CIGNA, the plan sponsor, converted to a cash balance plan as of 1/1/98, just as many employers did when the economy suffered the effects of the so-called "perfect storm" of the late Nineties, severely shrinking pension plan portfolios and increasing plan contributions necessary to maintain funding levels.

The cash balance format, which had been developed at that time, proved to be a particularly attractive alternative to plan sponsors, both because it provided a means of controlling costs of contributions and could be accomplished as an amendment of their defined benefit pension plans, inasmuch as cash balance plans were viewed as defined benefit plans also. Therefore the sponsors would be able to move the assets that had accumulated in their DB plan directly into the cash balance plan without

being subject to a tax that would otherwise be imposed on the recapture and re-contribution of those assets.

The conversion required proper notices to participants and the establishment of initial, hypothetical account balances in the converted plan for each participant reflecting the actuarial value of the benefits earned under the defined benefit plan up to the time of the conversion.

The CIGNA case turned largely on the appropriateness of the notices and adequacy of the value assigned to those initial accounts. The trial judge found that CIGNA's descriptions of the converted plan were significantly incomplete and misled its employees, and also that the initial accounts were understated. He concluded that section 502(a)(1)(B) provided him with the authority to reform the plan, and to grant the plaintiffs relief on the basis of the reformed plan.

The reformation involved the very technical conversion issue of what is called in the pension jargon "A plus B", as distinguished from "the greater of A or B". In the "A plus B" formulation, A stands for what had already been earned under the original plan before the conversion, and B stands for what would accrue under the new cash balance benefit, excluding the initial conversion account balance. In the "A or B" formulation, A has the same value, but B includes the initial balance plus the accruals under the cash balance benefit. The trial court substituted A plus B for the "greater of" formula in the CIGNA plan.

Typically under the early cash balance plans, the participant's benefit was the greater of A or B, which often involved what was called a "wearaway", meaning that for a period of some years after the conversion the participant would not derive any additional benefits under the cash balance formula until their total exceeded the A amount.(including the initial account balance), inasmuch as different actuarial assumptions might be appropriate for a cash balance formula than for a traditional defined benefit plan.

The Pension Protection Act of 2006 eliminated the "greater of A or B" option subsequent to its effective date. Presumably the CIGNA plan involved a wear-away element, since its conversion predated the PPA by a number of years, although that is not clear from the Supreme Court decision. That Court did not have to confront the reformation issue, since it held that plan reformation was not a proper remedy for a court to impose under section 502(a)(1)(B)

The Supreme Court, quoting some of the sponsor's representations of significant enhancements, overall improvements, steady growth, etc., and that the initial accounts "represent the full value of the benefit earned for service" before the conversion, observed that, in fact, the opposite was true, and that "the plan made a significant number of employees worse off" in particular ways that the Court enumerated. Nevertheless, the Court ruled that the plaintiffs could not recover under the statute they relied upon, because their claim was bottomed on the summary plan descriptions, and not on the "plan", which was required by the language of the statute (quoted above).

It is noteworthy that the U.S. Solicitor General argued for an alternative rationale in support of the plaintiffs, namely that the SPD's summary descriptions comprise terms of the plan. The Court was not swayed, wholly rejecting the SG's arguments that the terms of SPDs "may be enforced (under §502(a)(1)(B)) as the terms of the plan itself."

Divergence of Views of Majority and Concurring Cohorts of Court

Having concluded that the plaintiffs had no recourse under the statute because their claim rested on the SPD and not on the plan, and that the trial court lacked the authority to reform the plan to conform to the SPD or to otherwise change the plan on account of the plan sponsor's misstatements concerning the effect of the conversion on participants' benefits, was that to be the end of the road for the plaintiffs?

That is where the majority and concurring Justices parted ways. Justice Breyer found the answer in what he called the "nearby §502(a)(3)", which provides a remedy in ERISA for plan participants "to obtain other appropriate equitable relief (i) to redress such violations [of any provision of Title I of ERISA] or (ii) to enforce any provision of this (T)itle or the terms of the plan".

Presumably the nearness of subsection (a)(3) to (a)(1)(B) did not add anything to its appeal to the judge, whose opinion he buttressed with references to such distant sources as Francis' Maxims of Equity (1823), Story's Commentaries on Equity Jurisprudence (1877), and Adams' Commentary on the Law as Administered by the Court of Chancery (1881).

The answer of the majority, however, as stated in the Breyer opinion, was not to afford relief to the claimants (respondents in this appeal, since the Second Circuit Court of Appeals had affirmed their victory in the District Court in a brief summary order and the matter was before the Supreme Court on a grant of CIGNA's certiorari petition), but to vacate the judgment and remand the case for further proceedings below, for consideration of whether relief was available under subsection (a)(3), since the trial judge had explicitly not considered the applicability of that provision.

But the majority then proceeded to “identify equitable principles that the [trial] court might apply on remand”; and in the ensuing 20 pages the opinion provided a scholarly treatise on the equitable principles and remedies the lower court judges might consider, based on several distinct actions of CIGNA, that would “fall within the scope of the term ‘appropriate equitable relief’ in §502(a)(3).”

Scalia's response was terse:

I agree with the Court that §502(a)(1)(B) [citations omitted] does not authorize relief from misrepresentations in a(n) ...SPD. I do not join the court's opinion because I see no need and no justification for saying anything more than that.

In a subsequent portion he is more blunt:

The court's discussion of the relief available under §502(a)(3) ...is purely dicta, binding upon neither us nor the District Court. The District Court need not read any of it – and, indeed, if it takes our suggestions to heart, we may very well reverse.”

Justice Scalia (whose opinion is joined by Justice Thomas) also takes issue with the fact that the majority, in addressing (a)(3), ventures into an issue that the District Court expressly declined to answer, the lower court having stated that “the Court need not, and does not, decide whether Plaintiffs could obtain relief under §502(a)(3)”.

Scalia's pungent response to that:

It is assuredly not our normal practice to decide issues that a lower court ‘need not, and does not, decide...

COMMENT:

The Larger Question Raised By Majority Opinion

It seems to me that the majority opinion in this case poses an even larger question than the ones raised in the Scalia “concurrency”: has the Court now taken a second large step towards loosening the tight-knit set of enforcement provisions that Congress crafted with such precision in section 502 of ERISA, where it spelled out with exquisite care the permissible civil actions for enforcing the requirements of ERISA, specifying not just the harms proscribed and the corresponding remedies (e.g., recovery of lost benefits, injunctions, breach of fiduciary suits, clarifications of future benefits, other appropriate equitable relief), but also who may bring the remedial actions (for some causes, participants and beneficiaries, for others, the plan, for another, the Secretary of Labor along with participants, beneficiaries and fiduciaries). Congress obviously did not intend to allow free rein for claimants to pick and choose among all the available remedies, or to make multiple choices.

The Supreme Court itself has spoken of ERISA’s carefully crafted and detailed enforcement scheme in *Mertens v. Hewitt Associates*; and in *Varity Corp. v. Howe* it challenged the ability of plan participants that can sue under section 502(a)(1)(B) to also do so under 502(a)(3). In a concurrence by Chief Justice Roberts in *LaRue v. DeWolff, Bobefrg & Assoc.*, he questioned whether a similar line might be drawn between (a)(1)(B) and (a)(2).; and he further noted cases that have been decided in appellate courts barring claims that are essentially to recover plan-derived benefits from being recast as 502(a)(2) claims for breach of fiduciary duty. He felt constrained by the posture of the case on certiorari from proposing that the Supreme Court’s decision of the case under (a)(2) should have considered whether the possibility of relief under (a)(1)(B).affects the conclusion. He nevertheless did not hesitate to add:

I see nothing in today’s opinion precluding the lower courts on remand... from considering the contention.

Remembering LaRue

A couple of paragraphs above, I characterized the majority opinion as the second large step of the Supreme Court toward loosening the tight-knit

fabric of the enforcement provisions of ERISA. I was thinking of LaRue as having been the first step. There, the plaintiff, a participant in a 401(k) plan, who, having authority to direct investments of his own contributions, did so. His directions were ignored, he suffered losses, and he sued the plan sponsor and the plan. He rummaged through the basket of remedies provided in section 502, passed over the most obvious one -- a claim under subsection (a)(1)(B) for loss of benefits under his 401(k) plan -- and settled on (a)(3), claiming “appropriate equitable relief”.

The defendants moved to dismiss the complaint, contending that the plaintiff was really just suing for money damages, not equitable relief, and the trial judge agreed. So, on appeal, the plaintiff switched to an (a)(2) claim, which allows a suit against a fiduciary for breach of duty, which, if successful, permits a monetary claim against the fiduciary to make good to the plan any losses suffered by the plan.

A cause of action under (a)(2) is actually and specifically geared to the harm to a plan identified in ERISA section 409(a), which is a breach of duty by a plan fiduciary causing “losses to the plan”, for which the fiduciary must “restore to such plan any profits of such fiduciary made through use of assets of the plan”.

One cannot fail to note the repeated emphasis in the statute on the centrality of “the plan”, as the entity suffering the damage, the entity to which restitution is required, and the entity whose assets are being protected. Contrast this with (a)(1)(B), where the participant is the damaged party to whom the cause of action accrues, the plan merely the res from which his harm derives. Nevertheless, the plan itself is seen as central to the (a)(1)(B) cause of action by the entire Supreme Court bench that participated in the decision in CIGNA.

Contrariwise, in LaRue the full panel of the Supreme Court – albeit expressing their views in three separate opinions, a majority (5 Justices), and 2 concurring (2 Justices each) – permitted the plaintiff (the plan participant, who was the only one to suffer harm) to prevail in his (a)(2) claim, even though the plan itself suffered no harm and derived no benefit from the suit, except in the narrow sense that the plaintiff’s recovery could be said to accrue to the plan to the extent that the plaintiff’s account was part of the plan.

That result was all the more surprising when the author of the majority opinion, Justice Stevens, had to explain away (not very satisfactorily) the opinion of the Supreme Court in *Massachusetts Mutual Life Insurance Co. v. Russell*, which he himself had written 23 years previously, that had established that an (a)(2) claim could only be made to “protect the entire plan ...[not] the rights of an individual beneficiary.” It’s not that the Supreme Court had forgotten that piece of its past jurisprudence. The Fourth Circuit Court of Appeals, to which the trial court’s decision in *LaRue* went, had cited *Russell* in denying the appeal of *LaRue*, and characterized the remedy sought as “personal” to the plaintiff, expressing “skepticism...[that] could serve as a legitimate proxy for the plan in its entirety...” To hold otherwise, the Appeals Court opined, “threatens to undermine the careful limitations Congress has placed on the scope of the ERISA relief.”

That, it is submitted, is what, first, *LaRue*, and now *CIGNA*, are all about. The Supreme Court is obviously – and properly – concerned that plan participants get what is promised to them under their pension plans. Justice Breyer reached back to the 1823 book, *Maxims of Equity*, mentioned *supra*, for the noble phrase, “Equity suffers not a right to be without a remedy.”

Justice Scalia expressed the sentiment more earthily in his *CIGNA* concurrence:

Why the Court embarks on this peculiar path is beyond me. It cannot even be explained by an eagerness to demonstrate – by blatant dictum, if necessary – that, by *George*, plan members misled by an SPD will be compensated.

Lest one think this comment Scrooge-like, presumably, he adds: “That they will normally be compensated is not in doubt.”

Nature of the Judicial Process

The Justices of the Supreme Court take very seriously their titles. Justice is what they mean to deliver. The question – as posed in the title of this piece – is where does Law end and Justice take over? When is the judge – or Justice, if you please – free to reach beyond the law of the legislators to do justice in the case before him?

You will not find the answer in these lines. That is one of the great and eternal philosophical questions. To begin a search for the answer one could

do no better than to read Justice Benjamin Cardozo's little treasure of a book, *The Nature Of The Judicial Process*. A random flipping of its pages will produce myriad sign-posts to mark the path.

This passage on page 14 of the 11th printing, in 1941, is as good a start as any:

Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges.

In this sense, judge-made law is secondary and subordinate to the law that is made by legislators. It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided.