Guest Article

CIGNA Cash Balance Conversion Case: Justice Trumps Law 6-to-2 — But Who Got It Right?

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INTRODUCTION *and* PRECIS

The *CIGNA* decision (CIGNA Corp. v. Amara et al., 2011 U.S. LEXIS 3540, 179 L.Ed.2d 843), handed down by the Supreme Court on May 16, did not have the trappings of a *cause celebre* — just a holding under ERISA that misstatements in the summary plan description of a pension plan did not provide the grounds for a recovery at law. The holding of the Court was unanimous, all eight justices participating in the decision agreeing on the SPD issue. (The 6–2 division of the Court noted in the title of this article did not pertain to the SPD issue, but rather to a minority view of the grounds on which the decision should — or, more accurately should not — be rested.) The SPD holding in itself may be surprising to some, perhaps, albeit not earth-shaking. But the 6–2 split of the majority and concurring opinions will cast a long shadow, and might even 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). Therein lies the real interest in and importance of the case.

Would such an outcome advance justice or introduce chaos and confusion? The authors of the two opinions differ sharply. The author of this piece makes no effort to hide his view as to which got it right; and he also singles out a formidable former Justice of the Court in whose writings one can find persuasive evidence as to how he might have answered the question. It is for the reader to decide how he or she comes down on the matter.

JUST ANOTHER PENSION CASE *or* SOMETHING MUCH MORE?

On the face of it, the recent *CIGNA* decision would appear not very important, as pension cases go, certainly not as cash balance plan cases go. Nothing like the stir the *IBM* case made eight years ago when decided — not even at the High Temple of Justice in Washington, but at a lowly district court in southern Illinois 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 on which the trial court relied, the summary plan description cannot be the basis for establishing 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 supercede the plan language in some circumstances; but it is not of cosmic 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 joined the Court in time to participate in the deliberations), that they did not even cite those cases or note their existence; and, as will shortly appear below, 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, as already noted, unanimous, though not the reasoning — hence, the 6–2 split between the signers of the majority and concurring opinions.

The Court denied the plaintiffs' suit to recover benefits claimed under the terms of the plan in which they were participants. (The case had

been certified as a class action, so the named plaintiff sued individually and on behalf of all 25,000 others similarly situated, the "et al." of the title). The suit had been brought under the section of ERISA (502(a)(1)(B)) that provides for an action to 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, subsequently converted to a cash balance plan as of January 1, 1998, just as many other employers did when the economy suffered the effects of the so-called "perfect storm" of the late Nineties, severely shrinking pension plan portfolios and interest rates, thereby increasing the amounts and volatility of 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, because it provided a means of controlling costs of contributions. Equally significantly, it could be accomplished as a mere 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 recontribution 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 in the case of cash balance conversions the very technical transition 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 judge substituted the "A plus B" for the "greater of" formula in reforming 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 wearaway element, since its conversion predated the PPA by a number of years, although that is not clear from the Supreme Court decision, because the Court did not have to confront the reformation issue, since it held that plan reformation, an equitable remedy, was not proper for a court to impose under section 502(a)(1)(B), which provided only a law remedy.

The Supreme Court, quoting some of the plan sponsor's representations of significant enhancements, overall improvements, and steady growth of benefits after the conversion, and that the initial accounts would 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 (a)(1)(B) statute they relied upon, because their claim was bottomed on the summary plan descriptions, and not on the "plan", while reliance on the plan was required by the explicit language of the statute.

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

The Supreme 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, writing for the majority, 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". Apparently just the nearness of subsection (a)(3) to (a)(1)(B) was not considered enough by the judge to support his opinion, so he buttressed it 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 in the first instance of whether relief was available under subsection (a)(3), since the trial judge had explicitly not ruled on 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 of the slip opinion Justice Breyer provides a scholarly treatise on the equitable principles and remedies the lower court judges might consider, based on several distinct actions of CIGNA, that might "fall within the scope of the term 'appropriate equitable relief" in §502(a)(3)."

Scalia's response in his concurring opinion (in which Justice Thomas joined) 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 of his opinion 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 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'..."

THE LARGER QUESTIONS RAISED BY MAJORITY OPINION

The majority opinion in this case poses an even larger question than the ones raised in the Scalia "concurrence": 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 in the past 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, Boberg & 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, however, 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, where the majority opinion is characterized 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. His attorney 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 plan fiduciary for breach of duty, that, 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 that is 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 it is the participant who 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 (five Justices), and two concurring opinions (two 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. (Ed. Note: Parenthetically, it is to be noted, *LaRue* elicited an outpouring of commentary, not just from the Justices who participated in its decision, but also in the legal periodicals, among which is an article by this author appearing in Chapter 2 of the 2008 NYU Review of Employee Benefits and Executive Compensation, where the separate opinions of the Court are summarized and critiqued.)

The holding and analysis of the majority opinion is especially surprising when one considers that its author, Justice Stevens, had to explain away (not very convincingly) 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."

It is hard to argue with that assessment; and that, it is submitted, is what, first, *LaRue*, and now *CIGNA*, have done. Perhaps the Court has forgotten its own words in the leading case of *Pilot Life Insurance Co. v. Dedeaux:*

> "The detailed provisions of §502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans."

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 was less generous in characterizing the majority's action:

> "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."

Perhaps concerned lest his comment sound dismissive of harm to plan participants, he adds, "That they will normally be compensated is not in doubt."

LAW TRUMPED *or* LAW FINESSED?

That brings us to the question posed in the title of this article: who got it right, the six-judge majority who paved the way to a resort to equity, i.e., subsection (a)(3), in order to supply the trial judge with a way, on remand, to provide justice to the plaintiffs that a strict reading of the law would not permit — to wit, application of subsection (a)(1)(B) — or the other two judges who saw this journey into equity as a reach beyond "the only question properly presented for our review, and the only question briefed and argued before us" (to quote the last words on the subject in the concurring opinion). Remember too that the trial judge had expressly declined to rule on the applicability of (a)(3), prompting Scalia's salty observation quoted above that it's not the Court's "normal practice" to decide issues the lower court explicitly does not decide.

The majority does not criticize the trial judge for failing to decide the issue. It merely inferred why he did not do so and how he would have

decided it had he done so, purporting to divine that from what, according to the Breyer opinion, "the District Court strongly implied". Scalia does not let that pass; his comment: "I find no such implication whatever — not even a weak one." He then throws one more coal on the fire, observing that no "Member of this Court...to my knowledge has hitherto sought to guess what district judges would have decided beyond what they did decide."

What *is* strongly implied is the majority's determination to use this case as a vehicle to bring the "appropriate equitable relief" of (a)(3) into service here (but also, as the Court would surely realize better than any, as a powerful precedent in ERISA litigation generally). First, one can point to what would have seemed the improbability of the Court's having granted certiorari in the case, no matter the issue. No diversity of decision among the federal circuit courts is cited, nor is there one to my knowledge. No constitutional issue is present. The issue in dispute could hardly be considered high on anyone's list of important unresolved ERISA questions; nor would it appear that CIGNA's alleged harmful actions involved egregious behavior that cried out for the meting out of justice. So one must wonder at the motivation of the Court's having reached out for this case over the many it turns down every year.

Moreover, one would have supposed the basis on which the Court granted certiorari in *CIGNA* to have been a thin reed on which to predicate a theoretical exposition of the many ways in which equity could have led a trial judge to find an appropriate remedy in a case where the legal remedy provided by the statute was inapposite. As stated in the Breyer opinion, "We agreed to decide 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." In fact, the Court did not decide that, instead remanding the case to the lower courts, for the district court "to revisit its determination", and for it or the appellate court to determine "(w)hether or not the general principles we have discussed above are properly applicable in this case...".

What is even odder is the petition for certiorari on which the Supreme Court launched its dissertation of general principles available for providing legal relief against a plan sponsor. Again we have it on the authority of the Breyer opinion that the Court "granted the request *in CIGNA's petition* (italics added) to consider whether a showing of 'likely harm' is sufficient to entitle plan participants to recover..." It is doubtful that is what the plan sponsor was looking for from its petition. Clearly CIGNA was not asking the Court to go outside the holding of the trial judge to find a basis for holding it accountable on a theory of law that the judge expressly declined to apply. Once again the majority opinion is most helpful; it tells us exactly what position CIGNA took in supporting its petition:

> "It argues first and foremost that the statutory provision upon which the District Court rested its orders, namely, the provision for recovery of plan benefits, §502(a)(1)(B), does not in fact authorize the District Court to enter the kind of relief it entered here. And for that reason, CIGNA argues, whether the District Court did or did not use a proper standard for determining harm is beside the point".

Can there be any doubt that the Court went out of its way to provide its views on subsection (a)(3)? "Purely dicta". Scalia calls it. "The District Court need not read any of it...", he adds. Dictum or not, my guess is the trial judge will read every word of it. It is fair to ask, however, whether the Supreme Court was exercising the time-honored tradition of courts of law — before and after the merger of equity and law — to render justice when the law falls short of doing so, or whether the law was simply finessed in this case, by the creation of a cause of action beyond the deliberate design of Congress. For some guidance in answering this question, the following paragraphs may be helpful

NATURE OF THE JUDICIAL PROCESS

The Justices of the Supreme Court take very seriously their honorific 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 be surprised if you do not find the definitive answer in these lines. That is one of the great and eternal philosophical questions. To begin a search for the answer, however, 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."

I expect Justice Scalia would agree with that. Indeed the Court itself has said as much on numerous occasions. See, e.g., *Pavelic & LeFlore v. Marvel Entertainment Group:* "Our task is to apply the text, not improve upon it."

But, no more than the whole of Torah can be summed up while standing on one foot (the famous quote by the biblical scholar, Hillel, to the contrary notwithstanding), the Law versus Justice conundrum cannot be reduced to a few sentences. Justice Cardozo, quoting Gray and Pound, celebrated legal commentators who preceded him, writes:

> "...the difficulties of so-called (statutory) interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."

I expect Justice Breyer would take comfort in that.

In truth, neither statement, separately or together, encompass THE LAW written large, whether the law of the legislature or the law of the court. There is, at the very least, a third dimension, which for this observer is encapsulated in the maxim bannered atop the stage of my law school auditorium, which (if I recall the words accurately) reads —

> THE LAW MUST BE STABLE YET IT CANNOT STAND STILL

Not in stone, no more than in sand, can the law be written if it is to deliver the philosophic ideal of JUSTICE. Where law ends and justice begins is the place where the great Justices of the Supreme Court, past and present, have struggled and obviously continue to do so, internally and with each other, to find the seam. The philosopher's stone is given to none to possess alone. The law's the better for that shared possession

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