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# Explaining Employee Benefit Programs: Tell It Like It Is

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Employee benefit programs can be valuable tools in achieving an employer's objectives, if properly structured and presented.  The converse is also true: A poorly-designed benefits package or ill-conceived communication can undercut those objectives.  This was clearly illustrated in a recent decision by the United States Supreme Court in the case of CIGNA Corp. v. Amara, in which misleading and inaccurate communications fundamentally disrupted an otherwise valid and effective restructuring of a corporate retirement plan.

The facts of the CIGNA case are every bit as important and instructive as the legal issues involved.

**Background**

CIGNA, like many employers, decided to move away from its traditional defined benefit pension plan in which employees gradually earned a fixed retirement benefit that was based on their compensation in the final years of their employment.  A two-step procedure was adopted to first "freeze" the benefits that had already been earned, and then, second, to convert that benefit into an account balance in a "cash balance plan."

The benefits under the new plan would be equal to the sum of three amounts: (1) an initial deposit (reflecting the accrued benefits from the prior plan), (2) an annual deposit by CIGNA (which varied by employee, based on several factors), and (3) compound interest on the accumulation of the first two amounts (based upon five-year treasury yields).  The new plan provided that the retirement benefit would be paid in a lump sum and guaranteed that the amount payable at retirement would not be less than the benefit the employee had earned under the old plan when it was frozen.

Mathematically, if the investment yield for the new plan was not as high as projected (which, as fate would have it, turned out to be the case during the litigation), the shortfall from the projected growth of the initial deposit would effectively eat into the new annual additions and interest, sometimes fully consuming them.  As to Plaintiff Janice Amara, for example, the testimony indicated that "it would take over 10 years for her cash balance account to exceed the value of her previously earned benefits."

After a seven-day trial, extensive briefing, and argument, the trial court concluded, in a 122-page opinion, that the modifications adopted by CIGNA were valid, and found no age discrimination, improper benefit reductions, or "backloading" of the benefit funding.  However, a newsletter given to the employees in advance of the changes stated that:

- The new plan would "significantly enhance" CIGNA's "retirement program," would produce "an overall improvement in…retirement benefits," and would provide "the same benefit security" with "steadier benefit growth."
- The initial deposit in the new plan would "represent the full value of the benefit earned for service before 1998."
- "One advantage the company *will not* get from the…changes is cost savings."

The trial court found these statements (and others in the plan summaries required in connection with the changes) to be incomplete, inaccurate, and misleading. For example, the new plan was expected to save CIGNA $10 million per year.

The trial court found that the plaintiffs had met the standard of showing "likely harm" to them from these erroneous communications, entitling them to relief. After further briefing and argument, the trial court ordered that the plan be reformed to reflect benefits consistent with the faulty communications and that the benefits be paid in accordance with that reformation.

In particular, the trial court ordered that the plan maintain CIGNA's obligation to pay those benefits earned under the old plan as provided under the old plan, instead of replacing them with the initial deposit to the new plan. This had the effect of leaving the risk of plan investment yield on CIGNA, so that when interest rates declined, the cost of providing those benefits substantially increased.

**Opinion of the Supreme Court**

Eight Justices of the United States Supreme Court (Justice Sotomayor recused herself) agreed that the contents of the required forms of disclosure (notices of benefit reduction or Section 204(h) notices, Summary Plan Descriptions, and Summaries of Material Modification) are not "terms of the plan." Thus, the trial court could not base its relief upon the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), specifically Section 502(a)(1), allowing participants to recover benefits, enforce rights, and clarify future benefit rights "under the terms of the plan."

This conclusion resolved an issue considered, with diverse results, by several federal courts. The impact of the Supreme Court's decision lies in what remedies are available to participants and what must be proved to obtain them.

If a participant is to have a remedy for false or misleading statements in plan communications that are not part of the "plan," it will be under the sections of ERISA that govern breaches of fiduciary responsibilities. Those sections provide an opportunity for the participant to obtain "other appropriate equitable relief." Continuing a pattern of analysis adopted in a 1993 decision, the Supreme Court construed this phrase to limit remedies to "those categories of relief that were *typically* available in equity" (such as reformation of contracts and agreements, injunction, mandamus, and restitution, but only limited forms of monetary compensation).

This aspect of the Supreme Court's analysis harkens back to a time when courts of law resolved issues of law, and separate courts of chancery applied an alternative set of principles and remedies commonly referred to as "equity." In the federal court system, and in most other American jurisdictions, courts of chancery have been merged into courts of law for over 200 years. As a result, a party can seek both legal and equitable remedies in a single lawsuit in a single court.

In vacating the judgment of the trial court and remanding the case for further proceedings, the majority opinion, joined in by six of the justices, offered comments that strongly suggest that the relief crafted by the trial court, a reformation of the CIGNA benefit plan, might well be permissible under Section 502(a)(3) of ERISA as consistent with "typical" equitable remedies.

As a component of this approach, the historic requirements for each particular form of relief in equity will dictate whether that form is available in any particular case. Accordingly, for each equitable remedy the CIGNA trial court chooses to consider upon remand, it will need to ascertain the historic prerequisites of that form of relief in equity, and then determine whether those prerequisites have been established by its prior finding of "likely harm" (or by other evidence from the trial).

**Action Points**

Notwithstanding the complexities of construing a 1974 statute on the basis of ancient law, those attempting to administer benefit plans without litigation can find some guidance in the Supreme Court's opinion. We offer the following for consideration:

*For the Employer/Plan Sponsor:*

- Determine whether an independent "Plan Administrator" would better suit your needs. Under most plan documents,

this title refers to the party given discretion over plan administration, a role often reserved in the plan to the employer. This is frequently true even if an accounting or benefits administration firm supplies "third-party administrator" (commonly known as "TPA") services, but without assuming the official role. If the employer/plan sponsor serves as the plan administrator, any communications to the participants will potentially raise the question of which hat the employer is wearing.
- In communicating plan features and changes, resist the temptation to "sell it." If the employer/plan sponsor is either officially or effectively the plan administrator, the employer/plan sponsor will have significant fiduciary responsibilities in connection with plan communications. Language that would be considered mere "spin" if uttered by a non-fiduciary sponsor may be a clear breach of responsibility by a plan administrator.
- Recognize that the trial court in CIGNA approved the restructuring of CIGNA's plan. CIGNA had forecast savings of $10 million per year from this change. Absent the communications failure, it is likely that these savings or more would have been realized.

*For Fiduciaries/Plan Administrators:*

- Carefully segregate sponsor promotional materials from administrator disclosure documents.
- It is hard enough to summarize benefit provisions without making them pretty. The focus needs to be on descriptions that are as accurate and complete as possible, given requirements regarding their intelligibility.
- Bear in mind that although the Supreme Court held that a plan is not modified by its Summary Plan Descriptions, the Court held that erroneous disclosures can be actionable. Such communications may also play a role in the interpretation of plan ambiguities.
- Help keep the focus on the big picture. Recognize that modifications requiring several steps (for example, freezing of benefit accrual, adoption of a new plan, and conversion of benefits to a deposit) may be viewed as integrated. In such a case, the accuracy of communications may be viewed both separately and as part of the entire arrangement.
- Get used to technical talk about those "equitable remedies" that were "typically" offered by courts of chancery in 18th century England. The Supreme Court has apparently concluded that the drafters of ERISA were well acquainted with these subtleties.
- Consider whether it makes sense to have all substantive fiduciary plan communications drafted or reviewed by external benefits counsel.

**Conclusion**

Some points seem clear from the Supreme Court's opinion in CIGNA:

1. Summary Plan Descriptions and other required communications do not alter the actual terms of a plan (though they may yet play a role in the interpretation of ambiguous language);
2. Such communications may, if severely flawed, give rise to claims by participants for breach of the fiduciary duties that attend their distribution; and,
3. A reformation of a plan, to reflect the terms of the communications, cannot be effected under the benefit claim provisions, but instead must be accomplished as a form of "appropriate equitable relief."

The more profound learning to be garnered from CIGNA, however, comes from considering its history. CIGNA initiated its changes in 1997. It adopted its cash balance plan in 1998. The lawsuit was commenced in 2001. Over 25,000 participants were made parties to this class action which went to trial in 2007. The combined 172 pages of the trial court's opinions, issued in 2008, were accepted in 2009 by an intermediate Court of Appeals in what was essentially a one-sentence opinion. And now, the Supreme Court's May 2011 opinion has remanded the case back to the trial court for further proceedings.

Given that the trial court found that all of the CIGNA plan restructuring was permissible, it is hard not to speculate that this dispute would have concluded long ago and favorably to CIGNA had the participant disclosure been more complete and accurate. Legal arguments and principles of equity aside, the message is clear: In plan communications, fiduciaries (at least) should tell it like it is.



*For further information regarding the issues described above, please contact Michael L. Miller.*

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