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## **Cash Balance Plans**

### **Supreme Court Grants CIGNA's Request To Rule on Remedies for Deficient SPDs**

The U.S. Supreme Court announced June 28 that it will take up next term the issue of whether pension plan participants must show that they were "likely harmed" by a deficient summary plan description before they will be entitled to recover plan benefits as set out in the SPD (*CIGNA Corp. v. Amara*, U.S., No. 09-804, cert. granted 6/28/10).

The certiorari grant comes one month after Acting Solicitor General Neal Kumar Katyal filed a brief with the high court, urging it to turn away two certiorari petitions filed by CIGNA Corp. and participants in CIGNA's cash balance pension plan (105 PBD, 6/3/10; 37 BPR 1298, 6/8/10).

Although two petitions were filed with the high court, the certiorari grant applies to only one issue. The issue is whether a showing of "likely harm" is sufficient to entitle participants in Employee Retirement Income Security Act plans to recover benefits based on an alleged inconsistency between the explanation of benefits in an SPD and the terms of the plan itself.

There was no word from the high court on whether the second petition for review, filed by the plan participants, would be granted or denied by the court.

## **Evolution of the Case**

The case originated as one of the many lawsuits that alleged that cash balance pension plans are age discriminatory. This notion that cash balance plans discriminate against older workers has been shot down by all federal appeals courts, and the Supreme Court has repeatedly declined to entertain the issue.

Like the other federal courts, the U.S. District Court for the District of Connecticut ruled in February 2008 that CIGNA's cash balance plan did not discriminate against older workers. However, in that decision the district court found that CIGNA violated ERISA's notice and disclosure requirements when it gave participants notice of the conversion from a traditional defined benefit plan to a cash balance plan without explaining, for example, that the plan would result in a "wear away" of benefits ( 33 PBD, 2/20/08; 35 BPR 469, 2/26/08; 43 EBC 1001).

In particular, the district court found that the notices CIGNA provided about the plan conversion did not comply with ERISA Section 204(h), which prohibits plan amendments that provide for a significant reduction in the rate of future benefit accruals unless the plan administrator gives at least 15 days' notice prior to the effective date of the amendment. In addition, the court found that CIGNA violated ERISA Section 102's requirements for summary plan descriptions and summaries of material modifications (SMMs).

## **District Court's Remedies Decision**

Subsequently, the district court in June 2008 issued a decision addressing the remedies available to the participants for CIGNA's violation of the notice and disclosure requirements of ERISA (116 PBD, 6/17/08; 35 BPR 1509, 6/24/08; 45 EBC 1062).

In that decision, the district court refused to grant the participants' request that the cash balance plan be rescinded in its entirety to remedy CIGNA's failure to comply with ERISA Section 204(h). The court said it was "particularly reluctant" to order a "widespread return" of plan participants to the traditional plan as a remedy for the Section 204(h) violation given that the cash balance plan itself was legally valid under ERISA and that CIGNA had provided substantially accurate information about the plan amendment.

The district court went on to say that the proper remedy for CIGNA's failure to issue SPDs and SMMs that complied with ERISA was to grant the participants benefits using an "A+B" formula under which they would receive all of their traditional defined benefit plan benefits in the form those benefits were previously offered prior to the conversion, plus all the benefits they accrued under the cash balance plan.

After the district court set out the remedies that would be available to the participants, the district court stayed the case to allow the U.S. Court of Appeals for the Second Circuit to review the lower court's ruling before the remedies were implemented.

Last October, the Second Circuit affirmed the lower court's decision without giving an explanation for its rationale. In an unpublished decision, the Second Circuit said it was adopting the lower court's "well-reasoned and scholarly opinions" (192 PBD, 10/7/09; 36 BPR 2352, 10/13/09; 47 EBC 2709).

## **CIGNA and Participants File Petitions**

Both CIGNA and the participants filed petitions for review with the Supreme Court.

In its petition seeking high court review, CIGNA asked the court to decide whether a showing of "likely harm" is sufficient to entitle plan participants to recover benefits based on an alleged inconsistency between the explanation of benefits in an SPD and the terms of the plan.

CIGNA's petition was filed by Theodore B. Olson, Amir C. Tayrani, Vanessa A. Countryman, and John C. Cook of Gibson Dunn & Crutcher, Washington, D.C., and Joseph J. Costello, Jeremy P. Blumenfeld, and Jamie M. Kohen of Morgan Lewis & Bockius, Philadelphia.

The participants' petition asked the Supreme Court to decide whether the district court erred in concluding that it lacked the authority to require CIGNA to reinstate the traditional defined benefit plan as a remedy for CIGNA's violation of ERISA Section 204(h)'s notice provisions.

In addition, the participants asked the high court to determine whether the district court erred when it found that it lacked the authority to require CIGNA to provide "comparable" future benefits to participants as a remedy for inaccuracies contained in SMMs issued by CIGNA.

The participants' petition was filed by Stephen R. Bruce and Allison C. Pienta of Washington, D.C., and Thomas G. Moukawsher of Moukawsher & Walsh, Hartford, Conn.

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*By Jo-el J. Meyer*

*The full text of the Second Circuit's decision is at <http://pub.bna.com/pbd/083388.pdf>.*

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