The Impact of *Cigna v. Amara* on ERISA Reimbursement Claims

By: Professor Roger M. Baron and Marilyn F. Trefz[1]

The Supreme Court stated on May 16, 2011, "We cannot agree that the terms of statutorily required plan summaries may be enforced as the terms of the plan itself." This holding has a significant impact upon the enforceability of ERISA Reimbursement claims which have traditionally been based upon the terms set forth in Summary Plan Descriptions.

The U.S. Supreme Court handed down its decision in *Cigna Corp. v. Amara*[2] on May 16, 2011. Although the dispute in *Cigna* involves retirement accounts in a pension plan, the Court made a significant holding involving the documents required by ERISA in regard to plan administration. This holding may have a significant impact concerning health benefit plans, which are also fostered under ERISA. In particular, the *Cigna* decision holds that the terms of a "Summary Plan Description" are not in and of themselves, the terms of the Plan and do not qualify for enforcement under ERISA.

The *Cigna* decision discusses two types of documents, which are addressed under ERISA's statutory scheme – the "plan" and the "Summary Plan Description" or "SPD." A brief review of the nature of these documents is helpful.

The "Plan"

The term "plan" as utilized in the *Cigna* opinion is the "written instrument" authorized by ERISA, 29 U.S.C. § 1102(a)(1) which provides that "Every employee benefit plan shall be established and maintained pursuant to a written instrument." [3] The required features of this written instrument are set forth in 29 U.S.C. § 1102(b). Optional features are permitted under 29 U.S.C. § 1102(c). *Cigna* recognizes that the plan's "sponsor" (or employer) is responsible for creating and executing this written instrument.[4]

For more information regarding the required content of the "plan," one may wish to consult the publications provided by the Employee Benefits and Security Administration (EBSA) of the United States Department of Labor.[5] In practice, one finds that the nature and format of "plan" documents vary greatly, especially considering that both retirement plans and health benefit plans operate under the auspices of the same statutory provisions.[6]

The "Summary Plan Description" or "SPD"

The "Summary Plan Description" or "SPD" is authorized and required by ERISA, 29 U.S.C. § 1022. These documents, as described in *Cigna*, "provide communications with beneficiaries *about* the plan, but do not themselves constitute the *terms* of the plan."[7] The *Cigna* opinion recognizes that the plan administrator, as opposed to the plan sponsor, is responsible for "provid[ing] the participants with the summary documents that describe the plan in readily understandable form."[8]

The required content of the SPD is addressed by regulations promulgated by the Department of Labor.[9] These regulations require, *inter alia*, that the SPD contain information in regard to a participant's eligibility for benefits, the scope of benefits covered under the Plan, and a participant's rights and responsibilities under the Plan. Consistent with the Court's recognition in *Cigna*, these regulations refer to benefits and responsibilities under "the plan" itself.[10]

Enforceability of Summary Descriptions

The interests sought to be protected by the plaintiffs in the *Cigna* litigation were traceable to the terms of a Summary Plan Description or SPD. The dispute arose as a result of the decision by Cigna to restructure its pension plan in 1998. Prior to implementing the actual change, Cigna gave its employees a description as to how the changes would affect the retirement benefits and accrued accounts for existing employees. This description was more favorable to the participants than the actual terms of the new plan. The trial court "found that CIGNA's initial description of its new plan were significantly incomplete and misled its employees."[11] Additionally, the initial description failed to explain certain features calculated to save Cigna $10 million annually.[12] The trial court determined that Cigna's descriptions were "incomplete and inaccurate" and that Cigna "intentionally misled its employees."[13] One of the key issues for decision in this case was the enforceability of the written descriptions as to "how" the new plan would function – as opposed to enforcing the plan as it was actually written.

In the Supreme Court litigation, the Solicitor General had urged that the more favorable descriptions could be enforced as terms of the plan.[14] This argument failed, with the Court stating,

> We 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.[15]

> The rationale for this holding lies in the fact that SPDs are, in fact, descriptive of the terms of the plan but not the terms themselves.[16] The Court's holding on this issue is as follows:

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> We conclude that the summary documents, important as they are, provide communication with beneficiaries *about* the plan, but that their statements do not themselves constitute the *terms* of the plan.[17]

As to this holding, there is full agreement by the members of the Court.[18] Justice Scalia's concurrence is in full accord.[19] In fact, Justice Scalia would have the entire case rest solely on this issue.[20]

ERISA Reimbursement Claims

Virtually every ERISA Reimbursement claim presented today is predicated upon the terms of the SPD. As a result, the impact of the *Cigna* opinion is significant. According to *Cigna*, the terms of the SPD are not, in and of themselves, enforceable under ERISA. This applies to efforts under § 502(a)(1)(B) (direct enforcement of the terms of the plan) and would also apply to relief sought under § 502(a)(3)'s "appropriate equitable relief."[21]

Under the federal common law which has developed under *Sereboff* ,[22] it is necessary that the terms of the plan create a lien.[23] Language which merely purports to create a right of subrogation is insufficient.[24] Additionally, plan language may be deficient because it is overreaching in nature, extending the plan's rights into the general assets of the ERISA participant/beneficiary.[25]

"To sum it up, the plan's right of reimbursement must be found in the "plan" itself under Cigna and must further be set forth in the SPD by virtue of the DOL regulation."

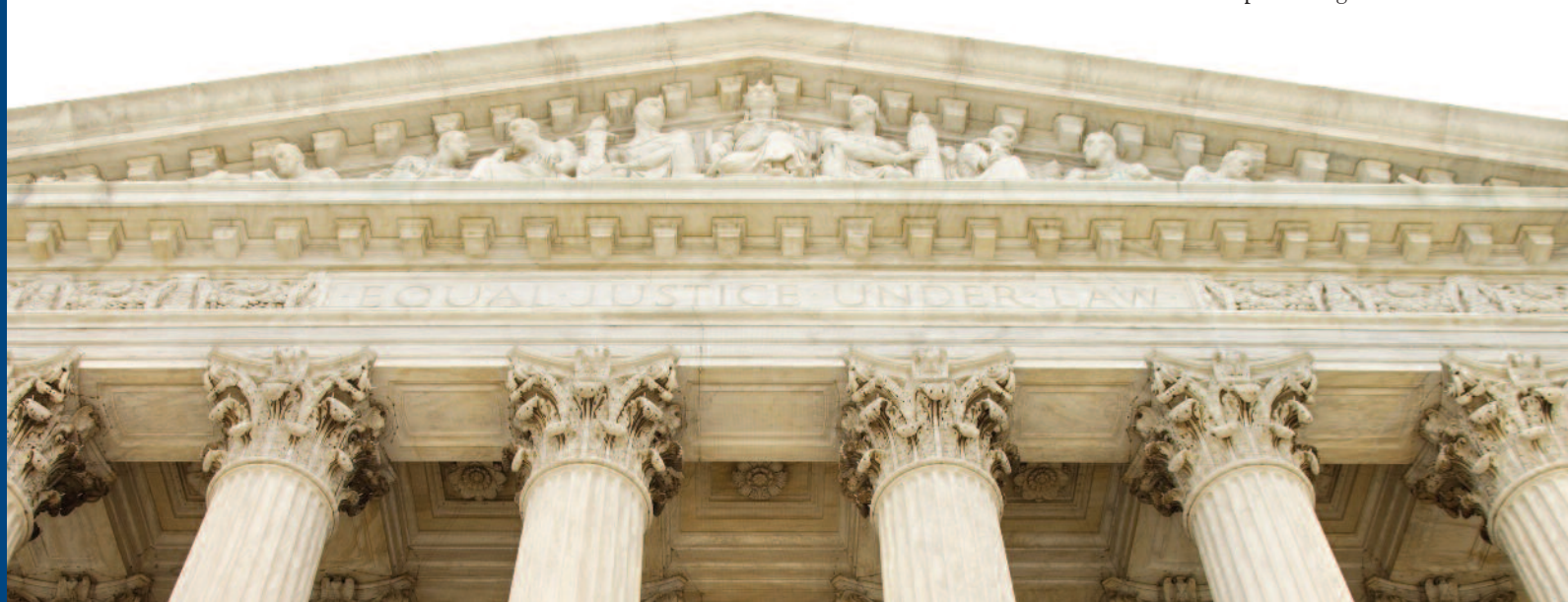
As a result of *Cigna*, it is now important that terms of the plan itself satisfy these common law requirements. It may be true, as recognized by Justice Scalia in his concurring opinion in *Cigna*, that an SPD can serve to amend a plan, but the plan itself must expressly so permit.[26] Nonetheless, the clear holding of *Cigna* tells us that the terms of an SPD are not the terms of the plan and, as such, do not qualify for enforcement under ERISA's remedy scheme. An attorney dealing with an ERISA reimbursement claim should insist that the terms of the "plan" itself are fully compliant with all aspects of the common law requirements for enforcement. It should also be kept in mind that the analysis should be made in connection with the plan provisions in effect at the *time of the injury*. It is inappropriate for a plan to retroactively apply the terms of a subsequent plan document.[27]

One final observation on this matter should be made. In addition to adhering to *Cigna*'s requirement that an enforceable right of reimbursement must be contained in the "plan" itself, the plan is still required to comply with 29 CFR § 2520.102-3(l) which mandates that the SPD contain notification of any right of subrogation or reimbursement that the plan may assert. [28]

To sum it up, the plan's right of reimbursement must be found in the "plan" itself under *Cigna* and must further be set forth in the SPD by virtue of the DOL regulation. If the right of reimbursement is found only in the SPD, then it is not enforceable under *Cigna*. If the right of reimbursement is found only in the plan itself, and not in the SPD, then the plan is in violation of 29 CFR § 2520.102-3(l).

Ascertaining Terms of the Plan

Because there is much inconsistency in the manner in which plan administrators or employers refer to ERISA benefit plan documents, the retrieval of such documents may be somewhat challenging. Additionally, important documents which govern the relationship between the entities providing services



may not be found in either the plan or the SPD.[29]

As noted above, the "plan" — often referred to as the "plan document" — describes the plan's terms and conditions related to the operation and administration of a plan, while the "SPD" is the main vehicle for communicating plan rights and obligations to participants/beneficiaries. In health benefit plans, as opposed to retirement plans, some employers (plan sponsors) use a "wrap plan," or "wrap document" which incorporates by reference the various insurance certificates, policies, contracts, booklets and other benefit descriptions provided by insurance carriers. Thus, a "wrap" document is a device designed to incorporate into the "plan" all of the terms of the various benefit documents.[30]

The "wrap plan" or "wrap document" device is sui generis, born outside of ERISA's nomenclature, and utilized by only a limited number of plans. Because of the wide variety of plan documents in use today, an employee encountering a potential reimbursement claim would be wise to first investigate the situation in house. The employee may consult with a member of the employer's Human Resources or Benefits Department to determine the company's benefit plan structure and appropriate terminology.[31]

An ERISA participant/beneficiary's ability to obtain access to the SPD is statutorily recognized.[32] This right has been meticulously guarded and enhanced by Department of Labor (DOL) regulations.[33] Participants are to receive SPDs within 90 days of becoming covered by the plan, and updated SPDs must be furnished every 5 years, if changes have been made to SPD information or if the plan is amended. Otherwise, an ERISA plan's SPD must be furnished to plan participants every 10 years.[34] One's right to access the SPD, the document upon which reimbursement claims have been traditionally based, has never been an issue.

With the Court's holding in *Cigna*, however, there is now a vital need for participants/beneficiaries to have access to the "plan" itself. Indeed, the need to examine the plan terms themselves (which were in effect at the time of the injury) is of critical importance to examine they are sufficient to create a lien.

Though both are required documents under the ERISA design, neither the "plan" nor the SPD are required to be filed with the Department of Labor. Still, both of these documents must be available to both plan participants, as well as the DOL upon request. This right is granted to participants by 29 U.S.C. 1024(b)(4) which provides as follows:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated *summary plan description*, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or *other instruments under which the plan is established or operated*. (emphasis added).

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The statute specifically provides that "the participant or beneficiary"[35] may make such a request.[36] A plan administrator's failure to provide this information within 30 days, results in a cause of action in favor of the beneficiary/participant against the administrator for the recovery of a penalty of up to $110 per day for each day of noncompliance.[37] The statute sets the amount at $100 per day, but a federal regulation, 29 CFR § 2575.502c-1, effective August 1999, authorizes up to $110 per day.

Conclusion

The *Cigna* decision, although rendered in the context of a pension plan dispute, appears to significantly impact the body of law concerning the enforceability of ERISA reimbursement claims. In particular, as a result of *Cigna*, it is now required that the ERISA plan's effort to seek reimbursement be traceable to the plan itself and not just to the SPD. The terms of the SPD, in and of themselves, are not enforceable as a judicial remedy afforded by ERISA. The plan's right of reimbursement must be traceable to terms of the plan itself and those provisions must be fully compliant with the federal common law which has evolved under *Sereboff* and its progeny.

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2 2011 WL 1832824

3 The majority opinion in *Cigna* refers to the "written instrument containing the terms and conditions" and "'a procedure' for making amendments" under 29 U.S.C. § 1102 on page 14 of the slip opinion. Justice Scalia states that ERISA "requires that a `plan' `be established and maintained pursuant to a written instrument,' § 1102(a)(1)." Page 1, J. Scalia's Concurring Slip Opinion.

4 "The plan's sponsor (e.g., the employer), like a trust's settlor, creates the basic terms and conditions of the plan, executes a written instrument containing those terms and conditions, and provides in that instrument "a procedure" for making amendments. § 402, 29 U.S.C. § 1102." Slip opinion at 14.

5 In connection with retirement plans, the EBSA advises that the plan instrument should include:
A written plan that describes the benefit structure and guides day-to-day operations;
A trust fund to hold the plan's assets (unless the plan is set up through an insurance contract),
A recordkeeping system to track the flow of monies going to and from the retirement plan; and
Documents to provide plan information to employees participating in the plan and to the government.
United States Department of Labor, EBSA, Meeting Your Fiduciary Responsibilities: What Are the Essential Elements of a Plan,
http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html (last visited May 20, 2011).

6 In regard to health benefit plans, it should be noted the EBSA instructs that the primary responsibility of ERISA fiduciaries "is to run the plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses." United States Department of Labor, EBSA, Health Plans & Benefits: Fiduciary Responsibilities, http://www.dol.gov/dol/topic/health-plans/fiduciaryresp.htm (last visited May 19, 2011).

7 Slip opinion at 15. (emphasis on "about" and "terms" is original with the Court).

8 Slip opinion at 14. Justice Scalia also recognizes, "ERISA's assignment to different entities of responsibility for drafting and amending SPDs on the one hand and plans on the other." J. Scalia's Concurring Slip Opinion at 2.

9 29 CFR §§ 2520.102-2 and 2520.102-3.

10 "The summary plan description shall be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their *rights and obligations under the plan*. "29 CFR §§ 2520. 102-2(a) (emphasis added); "The advantages and disadvantages *of the plan* shall be presented without either exaggerating the benefits or minimizing the limitations." 29 CFR §§ 2520.102-2 (b)(emphasis added); "The summary plan description must accurately reflect the *contents of the plan*" 29 CFR § 2520.102-3 (emphasis added).

11 Slip Opinion at 5.

12 Slip Opinion at 6.

13 "The District Court found that CIGNA told its employees nothing about any of these features of the new plan—which individually and together made clear that CIGNA's descriptions of the plan were incomplete and inaccurate. The District Court also found that CIGNA intentionally misled its employees." Slip Opinion at 8.

14 "The Solicitor General says that the District Court did enforce the plan's terms as written, adding that the "plan" includes the disclosures that constituted the summary plan descriptions. In other words, in the view of the Solicitor General, the terms of the summaries are terms of the plan." Slip Opinion at 13-14.

15 Slip Opinion at 14.

16 "information about the plan provided by those disclosures is not itself part of the plan. See 29 U.S.C. § 1022(a). Nothing in § 502(a)(1)(B) (*or, as far as we can tell, anywhere else*) suggests the contrary." Slip Opinion at 14. (emphasis added to language which extends holding beyond simple application of § 502(a)(1)(B).)

17 Slip Opinion at 15. (emphasis on "about" and "terms" is original with the Court.)

18 Note: Justice Sotomayor did not participate in this case.

19 "The District Court based the relief it awarded upon ERISA § 502(a)(1)(B), and that provision alone. It thought that the `benefits' due `under the terms of the plan,' 29 U.S.C. § 1132(a)(1)(B), could derive from an SPD, either because the SPD is part of the plan or because it is capable of somehow modifying the plan. Under either justification, that conclusion is wrong. An SPD is separate from a plan, and cannot amend a plan unless the plan so provides. See *Curtiss–Wright Corp. v. Schoonejongen*, 514 U.S. 73, 79, 85, 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995). J. Scalia's Slip Concurring Opinion at 2.

20 "Nothing else needs to be said to dispose of this case... I would go no further." Id.

21 "information about the plan provided by those disclosures is not itself part of the plan. See 29 U.S.C. § 1022(a). Nothing in § 502(a)(1)(B) (***or, as far as we can tell, anywhere else***) suggests the contrary." Slip Opinion at 14. (emphasis added to language which extends holding beyond simple application of § 502(a)(1)(B).)

22 *Sereboff v. Mid Atlantic Medical Services, Inc*, 547 U.S. 356, 126 S. Ct. 1869, 164 L. Ed.2d 612 (2006).

23 *Sereboff v. Mid Atlantic Medical Services, Inc*, 547 U.S. 356, 126 S. Ct. 1869, 164 L. Ed.2d 612 (2006); *Popowski v. Parrott*, 461 F.3d. 1367 (11th Cir. 2006); *In re Vioxx Products Liability Litigation*, 45 Employee Benefits Cas. 1192, 2008 WL 3285912 (E.D. La) (Aug. 7, 2008) aff'd in *Avmed Inc., et al. v. Browngreer PLC, et. al.*, 300 Fed. Appx. 261, 2008 WL 4909535 (November 17, 2008).

24 Id.

25 *Fleetwood Enterprises, Inc. v. Taylor*, 2007 WL 2826180 (W. D. Ky.) (2007); *James River Coal Company Medical and Dental Plans v. Bentley*, 2009 WL 2211906 (July 23, 2009).

26 "An SPD is separate from a plan, and cannot amend a plan unless the plan so provides." J. Scalia's Slip Concurring Opinion at 2.

27 *Gorman v. Carpenters' & Millwrights' Health Benefit Trust Fund*, 410 F.3d 1194 (10th Cir. 2005); *ACS/PRIMAX v. Polan*, 2008 WL 5213093 (W.D. Pa.); *Sheet Metal Workers Local 27 Health & Welfare Fund v. Beenick*, 2008 WL 5156663 (D.N.J.); *Burgett v. MEBA Medical And Benefits Plan*, 2007 WL 2815745 (E.D.Tex.).

28 The SPD must provide "a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery (e.g., by exercise of subrogation or reimbursement rights) of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section." 29 CFR § 2520.102-3(l).

29 Consider, eg., the situation where a commercial insurer is providing coverage to participants/beneficiaries through an ERISA plan. Important aspects of the relationship between the plan and the insurer may lie in the insurer's Master Contract, Certificate of Coverage, Administrative Services Contract or Summary of Benefits. Yet, none of these documents are considered to be either the "plan" or "SPD" under ERISA.

30 See eg., *Administrative Committee of Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Gamboa*, 479 F.3d 538 C.A.8 (Ark.), 2007; *Keogan v. Towers, Perrin, Forster & Crosby, Inc.* 2003 WL 21058167 (D.Minn.).

31 *Service of a 'Proper Request' upon the Plan Administrator: a Key Step in Defending against ERISA Reimbursement Claims* (2010), published in Trial Lawyer Journals in Massachusetts, Pennsylvania (Western Pa. Trial Lawyers "The Advocate" and Pa. Association for Justice "PA Justice New"), Ohio, South Dakota, Nebraska, Louisiana, Kansas, Colorado, Washington, Texas, Michigan, Utah and Vermont.

32 29 U.S.C. §1022(a); 29 U.S.C. §1024(b)

33 29 CFR §.104b-1(b) requires plan administrators to "use measures reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries," when distributing SPDs to employees.

34 29 CFR § 2520.104b-2. Additionally, 29 CFR § 2520.104b-3 requires that changes to the SPD must be reflected in a Summary of Material Modifications and that these Summaries of Material Modification must be must also be given to all plan participants and beneficiaries.

35 The term "participant" is defined in 29 U.S.C. 1002 (7) and generally encompasses employees and former employees. The term "beneficiary" is defined in 29 U.S.C. 1002(8) as "a person designated by a participant or by the terms of an employee benefit plan, who is or may become entitled to benefit thereunder."

36 Further, 29 CFR § 2520.104a-8 also grants the Department of Labor the authority to request and review "*any documents relating to the employee benefit plan*" upon service of a written request, on behalf of a plan participant or beneficiary.

37 29 U.S.C. 1132(c)(1)(B).