13-447(L)

13-526 (XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JANICE C. AMARA, GISELA R. BRODERICK, ANNETTE S. GLANZ, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants-Cross-Appellees

v.

CIGNA CORPORATION and CIGNA PENSION PLAN,
Defendants-Appellees-Cross-Appellants

On Appeal from the United States District Court
for the District of Connecticut

BRIEF FOR THE SECRETARY OF LABOR
AS AMICUS CURIAE SUPPORTING CROSS-APPELLEES
AND REQUESTING AFFIRMANCE ON THE CROSS-APPEAL

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STATEMENT OF INTEREST

The Secretary of Labor ("Secretary") has primary enforcement and interpretive authority for Title I of the Employee Retirement Income Security Act (ERISA). This case raises questions on the remedies available under section 502(a)(3) of ERISA for pension plan participants who received summary plan descriptions (SPDs) and other written materials promising benefits that were not, in fact, available under the terms of the plan. The Secretary, who previously filed briefs in the Supreme Court and in the district court remand proceeding in this case, has an interest in these issues and has authority to file this brief under Federal Rule of Civil Procedure 29(a).

STATEMENT OF THE ISSUES

Earlier proceedings in this case establish that CIGNA Corporation violated ERISA by promising pension benefits that were not available under the terms of its pension plan. In CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011), the Supreme Court vacated a decision of this Court upholding an award of relief under section 502(a)(1)(B) of ERISA and remanded for this Court or the district court to consider an award under section 502(a)(3) of ERISA. This Court remanded the case to the district court, and the district court awarded the same relief under section 502(a)(3) that it had previously awarded under section 502(a)(1)(B).

The Secretary will address the following question:

Whether the district court, in making this award, correctly applied the equitable remedies of reformation and surcharge.

STATEMENT OF THE CASE

A. CIGNA's Violations of ERISA

Before 1998, CIGNA provided a traditional defined benefit pension plan to its employees, i.e., a plan where a retiring employee would receive an annuity calculated on the basis of the employee's preretirement salary and length of service. Amara, 131 S. Ct. at 1870. In 1998, CIGNA converted this plan to a cash balance plan. Under the cash balance plan, most employees would receive a lump sum calculated on the basis of a defined annual contribution from CIGNA as increased by compound interest. Id.

Because ERISA prohibited CIGNA from reducing benefits that employees had accrued under the old plan, 29 U.S.C. § 1054(g), CIGNA had to ensure that employees would not lose these benefits. CIGNA could have done this by making an employee's accrued benefit in the old plan the opening balance of the new plan, and then adding the new plan's annual contributions and interest to this amount. This is the so-called "A+B" approach, where "A" means the accrued benefits under the old plan and "B" means additional benefits going forward under the new plan. Amara v. CIGNA Corp., 534 F.

Supp. 2d 288, 298 (D. Conn. 2008), aff'd, 348 Fed. Appx. 627 (2d Cir. 2009), vacated, 131 S. Ct. 1866 (2011). ERISA expressly requires this approach for cash balance plans converted from existing defined benefit plans after June 29, 2005. Pension Protection Act of 2006, Pub. L. No. 109-280, § 701(a), 120 Stat. 981 (29 U.S.C. § 1054(b)(5)(B)(iii)).

CIGNA did not adopt the "A+B" approach, however. Instead, CIGNA used the "greater of A or B" approach. Amara, 534 F. Supp. 2d at 298, 304. Under this approach, CIGNA gave participants the greater of the benefits they had accrued under the old plan ("A") or the benefits they would receive under the new plan ("B"). This approach allowed CIGNA to make an employee's opening balance in the new plan less than the full value of the benefits that employees had earned under the old plan, despite representations to the contrary. Amara, 131 S. Ct. at 1873. The practical effect was that the old plan set the ceiling on accrued benefits for however long it took for benefit credits added over time to the new plan to "wear away" and surpass the pre-conversion benefits. For some employees, this "ceiling" meant that they worked for years after the effective date of the new plan without receiving any additional benefits toward retirement. Id. at 304. Some employees accrued no additional benefits at all from the effective date of the new plan until they retired. Id. at 349.

Although the "greater of A or B" approach was permissible when CIGNA converted its plan, misrepresenting plan benefits to participants was not. Here, CIGNA violated ERISA by telling employees that they were getting the "A+B" approach, i.e., the approach that would have given them all of their accrued benefits under the old plan plus additional benefits under the new plan without any "wear away" period of no new accrued benefits. CIGNA did this repeatedly, in a November 1997 newsletter, a December 1997 retirement kit, and two SPDs. Amara, 534 F. Supp. 2d at 329-54.

In light of these misrepresentations, the district court (Kravitz, J.) found "that plan participants would reasonably believe that wear away [working without accruing additional benefits] was not a component of, or a likely result of" CIGNA's new plan. 534 F. Supp. 2d at 350. The court also found that CIGNA knew its intended approach would result in a number of employees working without accruing additional benefits. Id. at 305, 347. CIGNA also knew that employees lacked full information about provisions in the formal plan documents and were asking for more information; CIGNA, however, chose not to inform them about the true effects of the change to a cash balance plan. Id. at 342-43.[1] Instead, CIGNA informed its benefits department and the

[1] CIGNA's own survey showed that 92% of responding employees said that they "thoroughly read" the December 1997 retirement communications that

consulting company that helped CIGNA prepare the 1997 newsletter and 1998 retirement kit not to compare benefits under the two plans. Id. at 343. CIGNA did this to avoid employee opposition to the conversion, which had caused other employers to abandon or scale back similar changes to a cash balance plan. Id. "CIGNA's strategy proved successful at avoiding a similar revolt within the company." Id. CIGNA did not finalize its plan until December 1998. Id. at 300. At that time, the plan was made retroactive to January 1, 1998. Id.

B. The District Court's Initial Remedy under Section 502(a)(1)(B)

The district court limited relief to employees harmed by CIGNA's misrepresentations. Amara, 131 S. Ct. at 1875. To determine harm, the district court applied the "likely harm" standard of Burke v. Kodak Retirement Income Plan, 336 F.3d 103, 113 (2d Cir. 2003). Amara, 534 F. Supp. 2d. at 351.[2] The district court found that the Amara plaintiffs established that they were likely harmed by CIGNA's violations, and that CIGNA failed to show that the violations were harmless. Id. at 352-54. In particular, the court found that CIGNA's successful efforts to conceal the full effects of the transition to a cash

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falsely represented the new plan to have adopted an "A+B" approach. E-417 (Trial Exh. 133).

[2] Burke required an ERISA plan participant initially to show that he or she was likely harmed by an SPD disclosure violation. Id. at 351-52. If the participant made this showing, the employer could rebut it through evidence that the violation did not in fact cause the participant harm. Id.

balance plan had deprived employees of the opportunity to take timely action in response to the transition either by protesting when the change was implemented, leaving CIGNA for another employer, or filing a lawsuit. Id.

The district court rejected CIGNA's argument that questions of harm should be determined on an individual, employee by employee basis. The court reasoned that CIGNA had stipulated that the court could determine that no individual issues remained concerning likely prejudice or harmless error, and the court did so. Amara, 559 F. Supp. 2d 192, 196-97 (D. Conn. 2008), aff'd, 348 Fed. Appx. 627 (2d Cir. 2009), vacated, 131 S. Ct. 1866 (2011). The district court further ruled that even if individual issues remained open, CIGNA should not get another opportunity to raise them because CIGNA had declined to engage in relevant discovery and had failed to call any employee witnesses at trial. Id. at 197-98.

Based on its findings of violation and harm, the district court ordered the CIGNA plan to provide benefits under the "A+B" approach. Amara, 559 F. Supp. 2d at 210-14. The district court relied on section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), a provision authorizing an award of benefits under the terms of the plan. 559 F. Supp. 2d at 203-06. The district court did not reach section 502(a)(3), 29 U.S.C. § 1132(a)(3), a provision authorizing

appropriate equitable relief to redress violations of ERISA or plan terms, although plaintiffs asserted that section as an alternative basis for relief.

In its appeal to this Court from that decision, CIGNA argued only that the district court erred by awarding plaintiffs more benefits than they were told they would receive under the pension plan. Amara, 348 Fed. Appx. at 627. This Court summarily rejected that argument "for substantially the reasons stated" by the district court. Id. CIGNA then filed a certiorari petition asking the Supreme Court to decide whether a showing of "likely harm" is sufficient to entitle plan participants to recover benefits based on an inconsistency between the explanation of benefits in an SPD or similar disclosure document and the terms of the plan itself. Amara, 131 S. Ct. at 1871. The Amara plaintiffs also filed a certiorari petition, seeking additional relief. Amara v. CIGNA Corp., No. 09-784, 2010 WL 17042 (U.S.).

C. The Supreme Court's Decision

The Supreme Court granted CIGNA's petition and issued a decision vacating this Court's judgment and remanding for further proceedings. CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011). The Supreme Court did not disturb any of the district court's factual findings about CIGNA's violations of ERISA. Id. at 1882 ("We are not asked to reassess the evidence."). Instead, the Supreme Court established three principles concerning claims based on an inconsistency

between the explanation of benefits in the SPD or similar disclosure and the terms of the plan itself.

First, the Supreme Court concluded that section 502(a)(1)(B) does not authorize the district court's order reforming the plans. The Court reasoned that section 502(a)(1)(B) is limited to recovering (or declaring rights to) benefits under the written terms of the formal plan instruments, that the SPD is merely the summary and not the plan itself, and therefore section 502(a)(1)(B) cannot be used to enforce promises made only in SPDs or similar documents summarizing the plan. 131 S. Ct. at 1876-78.

Second, the Supreme Court addressed relief under section 502(a)(3) "given the likelihood that, on remand, the District Court will turn to and rely upon this alternative subsection." CIGNA, 131 S. Ct. at 1878. Holding that promises made only in an SPD or similar summary document could be enforced in an action for "appropriate equitable relief" under section 502(a)(3), the Court concluded that "the types of remedies the [district] court entered here fall within the scope of the term 'appropriate equitable relief' in § 502(a)(3)." Id. at 1880.

Third, the Supreme Court concluded that "any requirement of harm must come from the law of equity," "as modified by the obligation and injuries identified by ERISA itself." CIGNA, 131 S. Ct. at 1881, 1882. Applying this principle, the Supreme Court rejected CIGNA's argument that a participant

must always show detrimental reliance before a court can provide a remedy. Id. The Court explained that the law of equity did not traditionally require such a showing for all forms of equitable remedy; while detrimental reliance is required under an estoppel theory, id. at 1881, a court could reform a contract to reflect the mutual understanding of the contracting parties, without a showing of detrimental reliance, "where 'fraudulent suppressions, omissions, or insertions'" materially affected the substance of the contract. Id. (citation omitted). The Court further explained that while a court could grant a surcharge remedy to make a wronged beneficiary whole or to undo a trustee's unjust enrichment "only upon a showing of actual harm," detrimental reliance was not the only way to show actual harm. Id.

The Supreme Court instructed the district court "to revisit" its remedy determination "consistent with this opinion." Id. at 1882.[3] Subsequently, the Court granted the Amara plaintiffs' petition seeking review of this Court's decision denying additional relief and remanded without issuing a decision. Amara v. CIGNA Corp., 131 S. Ct. 2900 (2011).

D. District Court Proceedings on Remand

[3] Justice Sotomayor took no part in the consideration or decision of the case. Justices Scalia and Thomas concurred in the judgment, as rendered in the decision by Justice Breyer, but characterized the majority's discussion of section 502(a)(3) as mere dicta.

On remand, this Court further remanded the case to the district court. JA 321. In district court, the parties and the Secretary filed supplemental briefs on what remedies to award under section 502(a)(3) of ERISA. CIGNA also filed a motion to decertify the class, and the district court held an evidentiary hearing addressed mainly to the decertification motion. After Judge Kravitz's death, the district court (Arterton, J.) issued a decision awarding the same relief that Judge Kravitz had previously ordered and denied CIGNA's motion to decertify the class. Amara v. CIGNA Corp., 925 F. Supp. 2d 242 (D. Conn. 2012).

Analyzing CIGNA's violations in light of the "appropriate equitable relief" authorized by section 502(a)(3) and addressed by the Supreme Court, the district court determined that CIGNA's plan should be reformed to provide the A+B remedy described in CIGNA's SPDs and other communications. 925 F. Supp. 2d at 251-54. Alternatively, the court concluded that CIGNA could be surcharged for the same relief. Id. at 255-61. The court found it unnecessary to address estoppel and denied CIGNA's request to decertify the class and the Amara plaintiffs' request for additional relief. Id. at 247, 262-65.

SUMMARY OF ARGUMENT

A. The district court acted within its discretion in ordering CIGNA to reform its pension plan to provide the benefits CIGNA had promised in its summary plan descriptions (SPDs) and other materials. The court followed the

Supreme Court's decision in this case and the practice of equity courts in applying an equitable reformation standard based on contract principles (mistake by one party and inequitable conduct by the other party) rather than a standard that looks only to the settlor's intent. Based on largely uncontested findings that neither this Court nor the Supreme Court disturbed in the earlier appeals, the district court correctly determined that facts established in this case supported all the elements for equitable reformation: an agreement by CIGNA to provide promised benefits in exchange for work by its employees, mistake by the employees in expecting to receive those benefits, and inequitable conduct by CIGNA in affirmatively misleading its employees and preventing them from learning that CIGNA's plan gave them less than CIGNA promised in the SPDs and other materials. Under these findings, no further finding of individualized actual harm was needed. The court thus properly accepted generalized proof of employees' mistake based on the uniform nature of CIGNA's misrepresentations, evidence that employees thoroughly read materials containing these misrepresentations, CIGNA's successful efforts to prevent employees from learning about the true operation of the new plan, and CIGNA's failure to present any evidence that employees were aware that the plan would have the effect of freezing benefits at the Plan A level for many

participants for some period of time notwithstanding the promises that had been made about continuous accruals under the new plan.

B. If the Court reaches the surcharge issue, it should join other courts of appeals that have construed the Supreme Court's decision in this case to overrule circuit precedents limiting the monetary relief available under section 502(a)(3) of ERISA. Following the Supreme Court and applying trust law principles, this Court should hold that surcharge does not require a loss to an ERISA plan but instead is properly based on a loss to plan participants. The Court should also uphold the district court's findings that the elements of surcharge (fiduciary breach, actual harm, and causation) are met. The Court need not decide the precise standard of causation because the plaintiffs established that it is more likely than not that they suffered some monetary loss from being unable to take steps to avoid having their pensions reduced. Because they proved some loss, the district court properly followed trust law principles and this Court's precedents in resolving doubts about the extent of the loss in favor of the plaintiffs.

ARGUMENT

THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN ORDERING CIGNA TO PROVIDE THE "A+B" REMEDY THAT CIGNA HAD PROMISED IN ITS SPDS AND OTHER MATERIALS

The Supreme Court's decision in this case establishes that the "A+B" remedy the district court initially awarded under section 502(a)(1)(B) of ERISA is an "equitable" remedy under section 502(a)(3) that could be considered "appropriate" in this type of case. Amara, 131 S. Ct. at 1878-80. On remand, the district court based the "A+B" remedy on reformation and, alternatively, on surcharge -- two of the types of remedy that the Court explicitly recognized as encompassed within section 502(a)(3)'s "appropriate equitable relief" provision. Under the applicable abuse of discretion standard, Chao v. Merino, 452 F.3d 174, 185 (2d Cir. 2006), the district court's remedy should be affirmed because the district court's legal conclusions are correct, its factual findings are not clearly erroneous, and the remedy falls within a range of permissible remedial outcomes. See Kickham Hanley P.C. v. Kodak Ret. Income Plan, 558 F.3d 204, 209 (2d Cir. 2009).

A. Reformation Of CIGNA's Plan Is Appropriate In This Case

The Supreme Court, this Court, and other courts of appeals have recognized the authority of courts to reform ERISA plans in appropriate cases. Amara, 131 S. Ct. at 1879; McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund, 450 F.3d 91, 95-96 (2d Cir. 2006); Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 103 (2d Cir. 2005); Young v. Verizon's Bell Atlantic Cash Balance Plan, 615 F.3d 808, 817-21 (7th Cir. 2010); DelGrosso v. Spang & Co., 769 F.2d 928, 930 (3d Cir. 1985). The district court correctly concluded that, given the nature of ERISA plans, equitable reformation in the ERISA context is based on contract principles, rather than the testamentary or charitable trust principles advocated by CIGNA, and that the elements for contract-based equitable reformation are met in this case.

1. Equitable reformation is based on contract principles. The Supreme Court in this case understood the equitable remedy of reformation of an ERISA plan to be based on contract principles because its discussion of reformation addresses only the traditional power of an equity court "to reform contacts." Amara, 131 S. Ct. at 1879: "what the District Court did here may be regarded as the reformation of the terms of the plan, in order to remedy the false or misleading information CIGNA provided. The power to reform contracts (as contrasted with the power to enforce contracts as written) is a traditional power of an equity court, not a court of law, and was used to prevent fraud." Id. (citing

authorities). Equity courts thus had the power "to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other." Simmons Creek Coal Co. v. Doran, 142 U.S. 417, 435 (1892); see, e.g., Columbian Nat'l Life Ins. Co. v. Black, 35 F.2d 571, 573 (10th Cir. 1929). "Fraud" in equity generally consisted in "obtaining an undue advantage by means of some intentional act or omission that was unconscientious or a violation of good faith." 3 John N. Pomeroy, A Treatise on Equity Jurisprudence § 873 at 421 (5th ed. 1941).

Under this directly controlling Supreme Court and trust law the "trust" standard that CIGNA advocates, under which a court looks only to the settlor's intent to determine if the terms of a trust were affected by a mistake that would allow reformation, is totally inapt. See George G. Bogert et al., The Law of Trusts & Trustees § 991 (6th ed. 2013). This "trust" standard applies only when no consideration is paid for the creation of the trust, as in the common testamentary or charitable trust. Restatement (Third) of Trusts § 12, cmt. a (2003); Restatement (Second) of Trusts § 333 cmts. a and e (1959). When consideration is paid, the trust is more like a bargained-for contract and contract principles for reformation apply. Id. § 12, cmt. a; Restatement (Second) of Trusts § 333 cmt. e. Consideration is paid for ERISA plans because, even if not the product of a collective bargaining process, the plans and benefits they

provide are deferred compensation for employees' labor. See, e.g., S. Rep. 93-127, at 3 (1973); H.R. Rep. No. 93-533, at 2 (1973); Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 84 (2d Cir. 2001).

Accordingly, equitable reformation under a "contract" theory is entirely appropriate in the circumstance where, as here, employees worked under the mistaken belief that the plan would provide the benefits stated in the SPD and their mistake was caused by the employer's fraud or inequitable conduct. See Amara, 131 S. Ct. at 1879-80. Such reformation is most consistent with ERISA's purposes of requiring fiduciaries to act with the utmost care and loyalty when dealing with plan participants, 29 U.S.C. § 1104(a)(1), and providing appropriate remedies, sanctions, and access to federal courts to participants harmed by fiduciary breaches, 29 U.S.C. § 1001(b), and with the authority of an equity court to fit remedies to the nature of the right they were intended to protect. Amara, 131 S. Ct. at 1879.

In contrast, CIGNA's theory would virtually eliminate equitable reformation as a remedy for even the most egregious fiduciary misrepresentations because it would allow reformation only when an employer was itself mistaken in setting plan terms. Under CIGNA's theory, an employer could escape reformation by intentionally drafting plan terms that are unfavorable to employees and then misleading employees into thinking the

terms are favorable. None of the authorities cited by CIGNA supports insulating fraudulent misrepresentations in this way, and some of them in fact recognize that contract principles apply under ERISA, Cross v. Bragg, 329 Fed. Appx. 443, 453-54 (4th Cir. 2009), and when the settlor of a trust receives consideration. In re Estate of Duncan, 232 A.2d 717,720 (Pa. 1967).

2. The prerequisites for reformation exist in this case. The only prerequisites for contract reformation exist in this case, i.e., a mutual mistake of the contracting parties concerning their agreement or a mistake by one party and fraud or inequitable conduct by the other party, Amara, 131 S. Ct. 1879-80; Simmons Creek, 142 U.S. at 435. The district court correctly found that CIGNA's November 1997 newsletter, December 1997 retirement information kit, and 1998 and 1999 SPDs provide "sufficient evidence of the parties' mutual intent" to give participants their full benefits under the old plan (Part A) plus additional benefits under the new cash balance plan (Part B) that would begin accumulating immediately. Amara, 925 F. Supp. 2d at 254. That finding should be affirmed because it is uncontested that these materials promised A+B benefits. See Amara, 534 F. Supp. 2d at 306-09.

The district court also correctly determined that employees were mistaken about the actual plan terms. The court concluded that participants are mistaken when the plan terms do not reflect their reasonable expectations about

the scope of benefits. Amara, 925 F. Supp. 2d at 253-54. The court's conclusion is consistent with that of courts in other ERISA reformation cases, as the district court recognized. Id. (citing Young, 615 F.3d at 819, and Int'l Union v. Murata Erie N. Am., Inc., 980 F.2d 889, 907 (3d Cir. 1992)). The court's finding that participants reasonably expected A+B benefits is not clearly erroneous because it is supported by Judge Kravitz's earlier finding, undisturbed by this Court and the Supreme Court, that CIGNA's statements created a reasonable expectation that the new plan (Part B) would protect all of their benefits in the old plan (Part A) in the new plan's opening balance and that benefits under the new plan would begin accruing immediately. Amara, 925 F. Supp. 2d at 254.

Finally, the district court correctly determined that CIGNA engaged in fraud or inequitable conduct. The fraud consisted of "obtaining an undue advantage by means of some intentional act or omission that was unconscientious or a violation of good faith.'" Amara, 925 F. Supp. 2d at 253 (quoting 3 Pomeroy, supra, § 873, at 421). CIGNA's misleading notices about the effects of the plan conversion and affirmative statements designed to prevent plan participants from obtaining information that would have helped them evaluate the differences between the new and old plans or to protest the new plan easily met this fraud standard. The "inequitable conduct" element was

also satisfied because CIGNA's actions knowingly caused plan participants to form a mistaken view of what the new plan covered. Amara, 925 F. Supp. 2d at 253 (citing Tokio Marine & Fire Ins. Co. v. Nat'l Union Fire Ins. Co., 91 F.2d 964, 966-67(2d Cir. 1937)). Moreover, CIGNA's intent was to lull participants into wrongly thinking that accrual of benefits under the cash balance formula would invariably pick up where the old defined benefit plan left off. See Amara, 925 F. Supp. 2d at 253. Indeed, Judge Arterton's findings are largely based on Judge Kravitz's earlier findings, which CIGNA did not challenge in earlier proceedings in this Court or the Supreme Court; and they cannot be deemed clearly erroneous now.

3. CIGNA's arguments are unpersuasive. Rather than dispute that it acted fraudulently and inequitably, CIGNA, without citing to any cases involving reformation, invites the Court to add an actual harm requirement to the prerequisites for equitable reformation discussed above. CIGNA Br. 43-44. CIGNA's argument should be rejected because "any requirement of harm must come from the law of equity," Amara, 131 S. Ct. at 1881, and the law of equity does not require a showing of "actual harm" for reformation. See id. at 1879-81 (omitting any mention of actual harm in association with reformation, while specifically noting actual harm standard for make-whole surcharge); 3 Pomeroy, supra, § 870, at 384-85 (discussing elements of reformation with no

mention of actual harm) ; Restatement (Second) of Contracts § 155 cmt. e (1981) ("the party seeking relief need not show that the mistake has resulted in an inequality that adversely affects him").

This result makes sense because a showing of harm is generally not required to enforce a contract. Feifer v. Prudential Ins. Co. of Am., 306 F.3d 1202, 1213 (2d Cir. 2002). Reformation is a way of enforcing an agreement not reflected in the written contract; in that sense, breach of the extra-contractual agreement is all the harm that is needed. Reformation thereby conforms the contract to eliminate the inequity that would result from enforcing the written terms, where failure to do so would perpetuate such inequity. See Baltzer v. Raleigh & Augusta R. Co., 115 U.S. 634, 645 (1885) ("[I]t is well settled that equity would reform the contract, and enforce it, as reformed, if the mistake or fraud were shown."). The equity court need not find that the innocent party suffered any other actual harm to rectify the mutual mistake or the fraud or inequitable conduct.

CIGNA also argues that the "agreement" prerequisite to reformation is missing because CIGNA never intended for the new plan to provide what the SPDs and other materials said it would provide. CIGNA Br. 38. This argument is meritless because the SPDs and other materials provided by CIGNA to the participants clearly stated that benefits would continually accrue from the

beginning of the new plan, and these documents constituted the primary if not sole basis for participants to understand the plan's terms in the formative period leading up to and following the new plan's effective date; thus, the plan should be reformed in accordance with CIGNA's representations of an A+B benefit structure (with no "wear away" effect), notwithstanding its undisclosed contrary intentions manifested in the written plan that participants did not see for some time thereafter. See Amara, 534 F. Supp. 2d at 300; see also Restatement (Second) of Contracts §§ 2 cmt. b, and 3 cmts. a and b (1981); accord, Klos v. Polskie Linie Lotnicze, 133 F.3d 164, 168 (2d Cir. 1997) (objective intent of parties controls when interpreting a contract; "[t]he secret or subjective intent of the parties is irrelevant"). Certainly, CIGNA may not rely on the fact that it deliberately misled participants about the plan terms and that it never intended to adhere to promises that it clearly made as a defense to the plaintiffs' claim that the plan should be reformed to conform to the SPDs and other written materials.

Moreover, when reformation is based on one party's mistake and inequitable conduct by the other party, "reformation may be granted even though there was no prior agreement." Restatement (Second) of Contracts, supra, § 166 cmt. a. CIGNA should therefore be held to what the SPDs and similar documents it distributed said about the new plan. CIGNA's disclaimer

in its SPDs that the Plan is the controlling document is also not a defense to reformation. Verizon, 615 F.3d at 821 ("we cannot agree that the mere existence of plan trumps provisions precludes Verizon from reforming the Plan consistent with Plan communications").

Similarly, CIGNA fails to undermine the district court's finding that employees were mistaken about the terms of the new plan. Just because mistake is a mental state whose essential prerequisite is ignorance, 3 Pomeroy, supra, § 839, does not mean that the only way to prove this mental state is by examining the mental state of each of the approximately 27,000 participants in CIGNA's plan. CIGNA Br. 28-30; see Amara Response & Reply Br. 30. Uniform misrepresentations are susceptible to generalized proof. In re U.S. Foodservice Inc. Pricing Litigation, 729 F.3d 108, 118-19 (2d Cir. 2013); Branch v. White, 239 A.2d 665, 672 (N.J. Super. 1968). CIGNA made uniform misrepresentations in its SPDs, newsletter and retirement kit. CIGNA also incorrectly suggests, CIGNA Br. 30-31, that Verizon and Murata disagree on whether mistake is an actual, intent-based standard or a reasonable expectations standard. Both cases use both characterizations to express the same concept. Verizon, 615 F.3d at 819-20; Murata, 980 F.2d at 907. The characterization also makes no difference in this case because, based on the evidence, there is every reason to conclude that employees were mistaken about

the new plan, as CIGNA intended. As stated above, CIGNA's own survey showed that 92% of employees thoroughly read the retirement communications they received, employees asked questions, and CIGNA took steps to prevent employees from learning about the new plan. These facts support the district court's finding that employees were mistaken, and CIGNA – even though it had ample opportunity to do so and was subject to the burden-shifting regime of Burke at the time of the litigation – presented no evidence that employees harmed by the new plan were aware of its true consequences before CIGNA adopted it.

Finally, CIGNA is wrong to contend that section 502(a)(3) limits a court's authority to remedy CIGNA's inequitable conduct as plan administrator by reforming a plan drafted by CIGNA as plan sponsor. CIGNA Br. 41-42. Section 502(a)(3) "trumps the application of the general principle that ERISA does not regulate settlor activity." In re Unisys Corp. Retiree Med. Benefits ERISA Litig., 579 F.3d 220, 237 (3d Cir. 2009). Reforming CIGNA's plan is also not changing the SPD into the binding plan instrument for all purposes. CIGNA Br. 36, 40. The SPD and other written CIGNA communications are simply evidence of an agreement that can support reformation when there is additional proof of mutual mistake or a mistake by one party and inequitable conduct by the other party. The SPD is not itself a contract or a plan any more

than a binder of insurance is the final insurance policy in a case reforming the policy based on the binder, see Tokio Marine, 91 F.2d at 965.

B. CIGNA May Also Be Surcharged For The A+B Relief

Because the district court based its award on reformation rather than surcharge, this Court need not reach the surcharge issue if it upholds the award under a reformation theory, as urged above. To the extent the Court reaches the issue, the Court should join the other courts of appeals that have correctly construed the Supreme Court's decision in this case to overrule circuit precedents limiting the monetary relief available under section 502(a)(3). See Kenseth v. Dean Health Plan, Inc., 722 F.3d 869, 876-83 (7th Cir. 2013); Gearlds v. Entergy Servs., Inc., 709 F.3d 448, 452 (5th Cir. 2013); McCravy v. Metro. Life Ins. Co., 690 F.3d 176, 181-82 (4th Cir. 2012).[4] Indeed, this Court, like the district court on remand, should especially follow the Supreme Court's discussion of section 502(a)(3) remedies because the Supreme Court directed its discussion to the parties and facts of this case.

Consistent with the Supreme Court, this Court should hold that the only elements for surcharge are a fiduciary breach, actual harm, and causation; and that those elements are met here. See Amara, 131 S. Ct. at 1880-81. The Court

[4] The Secretary has argued for this result in amicus briefs submitted to this Court in Frommert v. Conkright, No. 12-67 (2d Cir.), and Osberg v. Foot Locker, Inc., No. 13-187 (2d Cir.), both of which are still pending.

should further reject CIGNA's argument that surcharge requires a loss to the plan and hold that the district court acted within its discretion in determining that the A+B recovery was the appropriate amount of surcharge.[5]

1. Loss to a plan is not required for surcharge. The term "surcharge" means a monetary remedy against a trustee imposed by a court in equity to compensate for a loss resulting from the trustee's breach of fiduciary duty or to prevent the trustee's unjust enrichment. Amara, 131 S. Ct. at 1880. The trust does not have to suffer a loss. Instead, as the Supreme Court concluded in this case, equity courts "simply ordered a trust or beneficiary made whole following a trustee's breach of trust." Amara, 131 S. Ct. at 1881 (emphasis added); see George G. Bogert, supra, § 862, at 34 ("trustee may be directed by the court to pay damages to the beneficiary"). That result makes sense because "[e]quity suffers not a right to be without a remedy." Amara, 131 S. Ct. at 1879 (citation omitted). Thus, when a beneficiary rather than a trust suffers a loss, the beneficiary receives the remedy. See, e.g., Kendall v. De Forest, 101 F. 167, 170 (2d Cir. 1900) (trustee is liable to annuitants for improperly paying trust

[5] The district court also properly concluded that a participant has to establish "actual harm" only when the participant seeks to surcharge a fiduciary for a loss to the participant ("make whole" surcharge) because no showing of loss is required under trust law when surcharge is imposed to prevent a fiduciary's unjust enrichment. See George G. Bogert, supra, § 861, at 5. This Court need not address the issue in this case because it should affirm the district court's A+B remedy under either reformation or "make whole" surcharge.

funds to someone else); Heady v. State ex rel. Heady, 60 Ind. 316, 1878 WL 5956 (Ind. 1978) (executors reimburse beneficiary for expenses that the executors, rather than the beneficiaries, should have paid).

The same rule applies in ERISA. Section 502(a)(2) of ERISA, which is not at issue in this case, provides an express remedy for *plan* losses. See 29 U.S.C. § 1132(a)(2) (fiduciary is liable for "appropriate relief under section 409," which, in turn, permits recovery of "losses to the plan"). Section 502(a)(3), the provision discussed by the Supreme Court in this case, provides an additional remedy for individual participants that is not available under section 502(a)(2). See Varity Corp. v. Howe, 516 U.S. 489, 507-15 (1996). Surcharge to redress loss to a plan is available under section 502(a)(2) and surcharge to redress loss to an individual is available under section 502(a)(3).

2. CIGNA's fiduciary breach caused harm to plaintiffs. There is no dispute that CIGNA breached its fiduciary duties as plan administrator by misrepresenting to plaintiffs that the new plan would provide all benefits under old Plan A plus additional benefits under new Plan B. These misrepresentations caused several kinds of harm to the plaintiffs.

First, the plaintiffs lost "a right protected by ERISA or its trust-law antecedents," Amara, 131 S. Ct. at 1881, by receiving inaccurate SPDs. See 29 U.S.C. §§ 1022, 1024; see also Laurent v. PriceWaterhouseCoopers, LLP, 2013

WL 4028181, at *17-*18 (S.D.N.Y. 2013); but see Skinner v. Northrup Grumman Ret. Plan B, 673 F.3d 1162, 1167 (9th Cir. 2012) (disagreeing that the loss of a right to an accurate SPD counts as the requisite harm). The participants were also harmed when their retirement benefits were diminished by the "wear away" phenomenon of having to work without accruing additional retirement benefits. Amara, 925 F. Supp. 2d at 259. Individual employees were deprived of individual opportunities to protest, negotiate for higher pay, seek other employment, change retirement savings, or file a lawsuit. Amara, 534 F. Supp. 2d at 354 (applying Frommert, 433 F.3d at 266). Being deprived of such opportunities establishes not only actual harm but detrimental reliance. See In re Unisys Corp., 579 F.3d at 229. Moreover, all employees were harmed because CIGNA's violations prevented the kinds of protests and organized opposition by employees that had led other companies to scale back or revoke similar conversions to cash balance plans. Amara., 534 F. Supp. 2d at 352-54. In this regard, the district court's findings merely confirmed the Supreme Court's supposition that "CIGNA's disclosure violations injured employees who did not act in reliance on the disclosures because they might have thought other employees would have let them know if plan changes were likely harmful." Amara, 131 S. Ct. at 1881.

In determining that CIGNA's misrepresentations caused this harm, the district court applied a "standard of but-for (or factual) causation," in which the court determined "what would have happened if CIGNA's notices had not been materially misleading." Amara, 925 F. Supp. 2d at 258. Under the court's "but-for" approach, once the plaintiff established "that the fiduciary breached its duty and that the plaintiff suffered a 'related loss,'" the "burden to disprove causation" shifted to CIGNA. Id.

Here, plaintiffs have proved actual harm "by a preponderance of the evidence." Amara, 131 S. Ct. at 1881. Under a counter-factual "but for" analysis that considers what would have happened if CIGNA had provided adequate notices, the plaintiffs established that it is more likely than not (the preponderance standard) that they suffered some monetary loss from being unable to take steps to avoid having their pensions reduced. As the Supreme Court said, "it is not difficult to imagine how the failure to provide summary information, in violation of the statute, injured employees." Id.; see also Amara, 534 F. Supp. 2d at 352-54; 925 F. Supp. 2d at 259-60 (discussing harm to participants).[6] Consequently, this Court can uphold the district court's

[6] In Silverman v. Mutual Ben. Life Ins. Co., 138 F.3d 98 (1998), this Court held that section 409(a) of ERISA, 29 U.S.C. § 1109(a), a provision making a fiduciary liable for losses "resulting from" a breach of fiduciary duty, places the burden of proving that a breach caused losses to a plan on the plaintiff. The Court rejected the Secretary's argument "that once a plaintiff has shown a

actual harm finding without deciding the precise standard of causation that applies in every case.

3. The district court properly resolved uncertainties over the extent of the harm against CIGNA. Once a court determines that a fiduciary has breached its duty and caused some actual harm, as here, the court properly resolves any uncertainties over the extent of loss against the breaching fiduciary. See George G. Bogert et al., supra, § 871, at 156-57; Restatement (Second) of Trusts, supra, § 205 cmt. f at 460; id. § 212(4) & cmt. e at 484, 486. This Court has repeatedly recognized that principle. See Silverman v. Mutual Benefit Life Ins. Co., 138 F.3d 98, 106 n.1 (2d Cir. 1998); Donovan v. Bierwirth, 754 F.2d 1049 (2d Cir. 1985); In re Beck Indus., Inc., 605 F.2d 624, 636 (2d Cir. 1979). The district court properly applied this principle in concluding that doubts about the extent of the plaintiffs' losses from the harm inflicted by CIGNA's fraudulent misrepresentations should be resolved by providing the A+B remedy. Amara, 925 F.3d at 258-60.

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breach of [an ERISA duty] and a related loss, the defendant must 'prove that the loss was *not* caused by its breach of fiduciary duty.'" Id. at 106 (citing Secretary's brief). However, Silverman did not involve section 502(a)(3) of ERISA, but rather turned on the Court's interpretation of the "resulting from" language in section 409, as incorporated into section 502(a)(2), language which is not found in section 502(a)(3). Moreover, the Court recognized that when a plaintiff proves some loss from a fiduciary breach, courts appropriately resolve doubts about the extent of damages against the breaching fiduciary. 138 F.3d at 106 n.1. As discussed in text, that doubt-resolving principle applies in this case.

CONCLUSION

The district court's award under section 502(a)(3) should be affirmed.

Respectfully submitted,

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NOVEMBER 2013

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 6907 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced typeface, using Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November 2013, the Brief for the Secretary of Labor as Amicus Curiae Supporting Cross-Appellees and Requesting Affirmance on the Cross Appeal was served on counsel of record through the Court's CM/ECF system. Six paper copies were mailed by express mail to the Court and two copies were mailed by express mail to the following counsel of record:

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