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The Impact of *Amara* on Coverage under Fiduciary Liability Insurance Policies

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This article discusses the impact *CIGNA v. Amara*[1] has had on securing insurance coverage for fiduciary liability claims relating to defined benefits plans. This U.S. Supreme Court decision changed the game for legal practitioners in this space because the *Amara* court held for the first time that "appropriate equitable relief" under ERISA includes monetary damages – which has important, attendant implications for insurance coverage.

ERISA Section 502(a)(2) permits beneficiaries to hold fiduciaries "personally liable" under ERISA Section 409 for breach of fiduciary duty.

2021 marked the 10-year anniversary of the paradigm-shifting ERISA decision, *CIGNA v. Amara*, in which the U.S. Supreme Court held "appropriate equitable relief" under ERISA included monetary damages in the form of the equitable "surcharge" remedy. Since then, "surcharge" has become the remedy of choice for ERISA plaintiffs against individual and corporate fiduciaries of defined benefits plans. Nonetheless, fiduciary liability insurers continue to seek to avoid their coverage obligations by construing all damages as benefits due under a plan (or the functional equivalent thereof), claiming that such damages are subject to the "benefits due" exclusion, which typically appears in such policies. The insurers' position, however, gives short shrift to *Amara* and fails to recognize how the "benefits due" exclusion only applies to ERISA Section 502(a)(1)(B) claims and not ERISA Section 502(a)(3) claims, including claims seeking surcharge under *Amara*.

Background

ERISA Section 502(a) prescribes the statute's civil remedies. ERISA Section 502(a)(1)(B) permits a beneficiary of a defined benefits plant to sue "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." ERISA Section 502(a)(2) permits beneficiaries to hold fiduciaries "personally liable" under ERISA Section 409 for breach of fiduciary duty. And ERISA Section 502(a)(3) permits beneficiaries "to obtain other appropriate equitable relief." Prior to 2011, courts often had held that "other equitable relief" meant equitable relief

typically available at common law, which included injunctions, mandamus and restitution – but did not include compensatory damages. But as ERISA practitioners know well, *Amara* changed everything.

***Amara* was a class action filed by beneficiaries of a defined benefits plan against their employer and the plan administrator, CIGNA.**

THE *AMARA* DECISION

Amara was a class action filed by beneficiaries of a defined benefits plan against their employer and the plan administrator, CIGNA, in which the beneficiaries alleged that CIGNA failed to give them proper notice of changes to the plan in violation of CIGNA's disclosure obligations under ERISA. The district court in *Amara* found that CIGNA's disclosures were "significantly incomplete and misled its employees" to their detriment. To remedy the harm, the court reformed the amended plan and ordered CIGNA to pay "'benefits under the terms of the plan' as reformed," citing ERISA Section 502(a)(1)(B). The Supreme Court ultimately reversed, holding that Section 502(a)(1)(B) cannot be invoked to alter the terms of a plan, because "[t]he statutory language speaks of 'enforc[ing]' the 'terms of the plan.'" Because the plan had been amended, the Court concluded that the beneficiaries had no remedy for lost benefits under Section 502(a)(1)(B), as the amended plan provided no such benefits.

Although the *Amara* beneficiaries had no claim for benefits, that did not mean they were without recourse. In the context of an amended plan, albeit one amended without the notice ERISA requires, the Court pivoted to a non-benefits-based remedy. The Court held that "appropriate equitable relief" under Section 502(a)(3) includes a "surcharge remedy," a "monetary remedy against a trustee" providing "make-whole relief" for "a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary." Since then, "surcharge" under Section 502(a)(3) has provided the remedy of choice for ERISA plaintiff lawyers.

Insured organizations and fiduciaries should push back strongly – the "benefits due" exclusion and *May* – they do not apply to *Amara* damages.

THE COVERAGE IMPLICATIONS OF *AMARA*

Although 10 years have passed since *Amara*, fiduciary liability insurers persist in arguing that damages sought under ERISA Sections 502(a)(2) and 502(a)(3) are not covered, relying on fiduciary liability policies' "benefits due" exclusion and the U.S. Court of Appeals for the Seventh Circuit's pre-*Amara* decision in *May Department Stores Co. v. Federal Insurance Co.*[2] Even if they do not deny coverage, insurers often seek a discount for these defenses. Insured organizations and fiduciaries should push back strongly – the "benefits due" exclusion and *May* – they do not apply to *Amara* damages.

The "benefits due" exclusion often bars coverage for

> any obligation under a Plan to pay to a beneficiary of the Plan money or property, including any such obligation which would exist under a Plan if the Plan complied with all applicable laws.

Often, the exclusion creates an exception for the liability of an individual fiduciary, but not always. (Similarly, plaintiff attorneys often sue individual fiduciaries, but not always.)

Importantly, the "benefits due" language must be read in the context of Section 502(a)(1)(B)'s authorization of a beneficiary to sue for "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."

Importantly, the "benefits due" language must be read in the context of Section 502(a)(1)(B)'s authorization of a beneficiary to sue for "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 policy language also tracks *Amara*'s characterization of the Section as mechanism for enforcing the terms of a plan. According to *Amara*, if a plaintiff is seeking a remedy other than what falls within the statutory language of Section 502(a)(1)(B), then the plaintiff likely is seeking an extra-contractual remedy under Sections 502(a)(2) or 502(3). By its very nature, an extra-contractual remedy does not involve a benefit due under a plan.

Insurers will also defend that the damages sought are the functional equivalent of a benefit and therefore are excluded, relying on *May Department Stores*. Insurers claim that under *May* "it is irrelevant under which provision [ERISA claims are] brought. What was being sought were benefits, and characterizing an award of benefits as a form of equitable relief would not bring it outside the exclusion in the policy." But *May* was decided before *Amara* expanded the remedies available under Section 502(a)(3). The ERISA landscape shifted with *Amara*, leaving *May Department Stores* far behind. The "functional equivalent" argument fundamentally misses the point of *Amara,* that monetary damages under Sections 502(a)(2) and 502(a)(3) are not benefits under a defined benefits plan. Insurers do not get to play horseshoes with their exclusions or with ERISA; close enough is not good enough.

Considerations for Insureds

Insureds under fiduciary liability plans (whether unincorporated boards and committees, the plan itself, the sponsor organization, or the individual fiduciaries) should consider the following with respect to their fiduciary liability policies and the ERISA claims against them.

(1) Be mindful of the policy language when purchasing fiduciary liability coverage. There is significant variation in "benefits due" exclusions (e.g., whether there is an exception for individual fiduciaries), and purchasing policies with more favorable language can save later legal expenses for coverage attorneys.
(2) Some insurers are adding "surcharge" exclusions – avoid those policies.
(3) Build the record of the insured defendants' potential exposure under Sections 502(a)(2) and 502(a)(3), including with liability assessments by defense counsel.
(4) Respond to insurer arguments about the "benefits due" exclusion with deep understanding of how ERISA actually works.

Notes

1. 563 U.S. 421 (2011).
2. 305 F.3d 597 (7th Cir. 2002).

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