UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOSEPH L. PIKAS, on behalf of himself and All Other Persons Similarly Situated,	)	
Plaintiffs,	)	Case No. 4:08-cv-00101
v.	)	Judge Gregory K. Frizzell
THE WILLIAMS COMPANIES, INC., **et al.**	)	Magistrate Judge Paul J. Cleary
Defendants.	)	**MEMORANDUM OF AMICUS CURIAE AARP IN SUPORT OF PLAINTIFFS**

This Court has determined that the defendants are liable for their failure to include cost of living adjustments in the lump sums distributed to plaintiffs. *Pikas v. Williams Cos.*, 2012 U.S. Dist. LEXIS 150603 (N.D. Okla. Oct. 19, 2012). Although there is more than one potential avenue to award relief to the plaintiffs, amicus AARP's memorandum only concerns potential relief under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3).

AARP submits that the defendants should be surcharged the difference between the lump sum amount actually paid to the plaintiffs and the amount that should have been paid to the plaintiffs if the defendants had included the cost of living adjustment. Prejudgment interest should also be awarded only on that differential amount.

ARGUMENT

SURCHARGE IS "APPROPRIATE EQUITABLE RELIEF" UNDER ERISA TO REMEDY THE FAILURE OF DEFENDANTS TO INCLUDE COST OF LIVING ADJUSTMENTS IN PLAINTIFFS' LUMP SUM CALCULATIONS.

A. *CIGNA Corp. v. Amara* Provides The Standards For Determining Appropriate Equitable Relief Under Section 502(a)(3) Of ERISA.

In *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1878-79 (2011), the Supreme Court confirmed that "appropriate equitable relief" refers to those categories of relief that were typically available in equity before the merger of law and equity in actions against fiduciaries. The Court expressly identified injunction, reformation, surcharge, and estoppel as remedies available against ERISA fiduciaries. The Court explained that "the relevant standard of harm will depend upon the equitable theory by which [a court] provides relief." *Id*. at 1871.

B. The Rationale Set Forth in *Cigna v. Amara* Concerning The Meaning Of "Appropriate Equitable Relief" Should Be Followed In This Case.

The Supreme Court's conclusion, *see supra* Part A, that surcharge is a form of "appropriate equitable relief" under ERISA is a holding because it was an essential part of the Court's decision. *See* Black's Law Dictionary 800 (9th ed. 2009) (defining "holding" as "[a] court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision"). The Supreme Court granted review to determine if the district court "applied the correct legal standard, namely, a 'likely harm' standard, in determining that CIGNA's notice violations caused its employees sufficient injury to warrant legal relief." *Amara*, 131 S. Ct. at 1871.

In response to CIGNA's argument that a "likely harm" standard was improper because plaintiffs cannot recover benefits based on an inconsistency between a summary plan description and the plan under section 502(a)(1)(B), the Supreme Court agreed that section 502(a)(1)(B) did

not authorize plaintiffs' suit. *Id.* at 1878. However, in response to CIGNA's corollary argument that the lower court improperly used a "likely harm" standard because plaintiffs can only recover benefits based on such inconsistency by proving detrimental reliance under section 502(a)(3), the Supreme Court agreed with CIGNA that section 502(a)(3) provides an avenue for relief, but disagreed that a showing of detrimental reliance was always required. *Id*. at 1876-80. The Court thus resolved the question on which it had granted certiorari – "the appropriate legal standard in determining whether members of the relevant employee class were injured," 131 S. Ct. at 1880 – by holding that, for example, "to obtain relief by surcharge for [statutory violations of ERISA], a plan participant or beneficiary must show the violation injured him or her. But to do so, he or she need only show harm and causation." *Id.* at 1881. The Supreme Court's analysis of the remedies available under section 502(a)(3) was therefore necessary for the Court to decide the question upon which it had granted certiorari. Because the Court's analysis of the remedies available under section 502(a)(3) was a necessary part of the Court's resolution of the question it had granted certiorari to decide, it is a holding and not dicta. *See, e.g.*, *Brooklyn Legal Servs. Corp. B v. Legal Servs. Corp.*, 462 F.3d 219, 235 (2d Cir. 2006) (reversing district court for characterizing as dicta reasoning that was essential to a Supreme Court decision). *But see Amara*, 131 S. Ct. at 1884 (Scalia & Thomas, JJ, concurring);[1] *Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162, 1165-67 (9th Cir. 2012) (calling *Amara*'s discussion of equitable remedies dictum, without analysis, but nevertheless considering the availability of these remedies).

Moreover, even if this Court considers the above reasoning from *Amara* to be dicta, it must still follow the opinion. As the Tenth Circuit has repeatedly attested to, it is "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the

[1] We note that Justices Scalia and Thomas incorrectly characterized the majority's discussion of section 502(a)(3) as dicta by focusing only on the first part of CIGNA's argument. *Amara*, 131 S. Ct. at 1882-83 (Scalia & Thomas, JJ., concurring).

dicta is recent and not enfeebled by later statements," *United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007) (brackets and further quotation omitted); *Oyebanji v. Gonzales*, 418 F.3d 260, 265 (3d Cir. 2005); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996).

Inferior federal courts "have the responsibility to follow directly applicable Supreme Court decisions." *United States v. Perez-Hernandez*, 133 Fed. Appx. 475, 477 (10th Cir. 2005) (quoting *United States v. Ordaz*, 398 F.3d 236, 241 (3d Cir. 2005). For these reasons, this Court must follow *Amara* in reaching its decision concerning "appropriate equitable relief" and whether surcharge in this case is "appropriate equitable relief" for the losses caused by the defendants' failure to include cost of living increase calculations in its employees' lump sum pension benefits.

C. Participants Have Suffered Actual Harm Due To Defendants' Violation Of ERISA's Actuarial Equivalence Rule.

The Supreme Court concluded that "any requirement of harm must come from the law of equity," *Amara*, 131 S. Ct. at 1881, "as modified by the obligation and injuries identified by ERISA itself," *id.* at 1882. Accordingly, a court could provide a surcharge or make-whole remedy upon a showing of actual harm, which harm could, but did not have to, be detrimental reliance. *Id.* at 1881-82. The Court explained:

> [The actual harm] might also come from the loss of a right protected by ERISA or its trust-law antecedents. In the present case, it is not difficult to imagine how the failure to provide proper summary information, in violation of the statute, injured employees even if they did not themselves act in reliance on summary documents -- which they might not themselves have seen -- for they may have thought fellow employees, or informal workplace discussion, would have let them know if, say, plan changes would likely prove harmful. We doubt that Congress would have wanted to bar those employees from relief.

Id. at 1881.

Congress declared in ERISA's "Finding and Declaration of Policy" "that it is . . . in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of . . . [employee benefit] plans . . . ." ERISA § 2(a), 29 U.S.C. § 1001(a). In response to these problems, Congress prescribed unequivocal minimum vesting and accrual standards. *See* ERISA § 204, 29 U.S.C. § 1054 (accrual of pension benefits); ERISA § 203, 29 U.S.C. § 1053 (vesting of pension benefits); *see generally Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) ("ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection."); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510, n.5 (1981).

The vesting and accrual rules work together to protect an employee's retirement benefit. As the Supreme Court explained, accrual is "the rate at which an employee earns benefits to put in his pension account." *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 749 (2004). Once participants have earned an amount toward their pension it cannot be reduced. Correspondingly, vesting is "the process by which an employee's already-accrued pension account becomes irrevocably his property." *Id.* Once participants have vested they have a legally enforceable right to a pension and cannot lose it.

To protect an employee's vested and accrued benefit, Congress also enacted Section 204(c)(3) of ERISA, 29 U.S.C. § 1054(c)(3) -- the actuarial equivalence rule. That rule provides that if a defined benefit pension plan allows for a lump sum distribution, then that distribution must equal the present value of the accrued benefit expressed in the form of a single-life annuity. 29 U.S.C. § 1054(c)(3); 26 U.S.C. § 411(c)(3); 26 C.F.R. § 1.417(e)-1(d). Otherwise, as the Seventh Circuit stated in a similar case, the plan "seeks to disguise a penalty exacted against lump sum recipients as a bonus afforded to annuitants" by excluding the COLA from the

participants' accrued benefit. *Williams v. Rohm & Haas Pension Plan*, 497 F.3d 710, 713 (7th Cir. 2007).

Here, this violation of ERISA's unambiguous actuarial equivalence rule actually harms participants because they have lost some of their pension benefit amount – a right protected by ERISA.

D. Surcharge Is Appropriate Equitable Relief To Remedy The Fiduciaries' Violation Of The Actuarial Equivalence Rule.

This case is akin to a suit in equity by a beneficiary against a plan trustee about the terms of a trust, which "is the kind of lawsuit that, before the merger of law and equity, [the plaintiffs here] could have brought only in a court of equity, not a court of law." *Amara*, 131 S. Ct. at 1879; *cf. id*. (noting that ERISA typically treats a plan fiduciary as a trustee).[2] In such a suit, "[e]quity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty . . . ." *Id.* at 1880. This remedy, sometimes called a "surcharge," "extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary." *Id.* The purpose of these remedies serve a goal of equity to place the beneficiary in the position he or she would have been in if the fiduciary breach had not occurred. Restatement (Second) of Trusts § 197, 198, 205 (1959). "Surcharge" is therefore "appropriate equitable relief" in a suit under section 502(a)(3). *Amara*, 131 S. Ct. at 1880. This relief may be awarded pursuant to an injunction surcharging the Williams Plan and other defendants for the difference between what it actually paid the employees and the amount it should have paid them, plus prejudgment interest on the differential amount in order to compensate the plaintiffs for their loss of the use of their money. *See Weber v. GE Group Life*

[2] AARP notes that defendants include the Administrative Committee of the Williams Plan which acts as the plan administrator. Under ERISA, the plan administrator is always considered a fiduciary. *See* Section 3(14)(A), 29 U.S.C. § 1002(14)(A).

Assur. Co., 541 F.3d 1002 (10th Cir. 2008) (citing *Allison v. Bank One - Denver*, 289 F.3d 1223 (10th Cir. 2002) (prejudgment interest is appropriate when its award serves to compensate the injured party and its award is otherwise equitable)).

CONCLUSION

For the reasons stated above, AARP submits that defendants should be surcharged for the difference between what was actually paid to the employees and the amount that should have been paid them, plus prejudgment interest on the differential amount.

Dated: November 13, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2012, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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