No. 11-978

In The Supreme Court Of The United States

JOHN SULLIVAN, et al.
Individually and as representatives of a class,

Petitioners,

v.

CUNA MUTUAL INSURANCE SOCIETY and
CUNA MUTUAL GROUP MEDICAL CARE PLAN FOR RETIREES,

Respondents,

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Woody Guthrie sang: "Some will rob you with a six-gun/And some with a fountain pen." Judge Hamilton quoted this passage in his dissent. This case squarely poses the question regarding the extent a fiduciary is allowed to mislead retirees and provides the Court a unique opportunity to harmonize the disparate decisions in this important area of law.

ARGUMENT

I. The Issues Presented by the Petition Were Raised and Considered by the Court of Appeals.

CUNA suggests that the Supreme Court should deny review because the misrepresentation claim was not considered by the court of appeals. (Brief in Opposition to the Petition for Writ of Certiorari [hereinafter "Resp. Brief"], pp. 12-13). The precise quote from *Penn. Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-213, 118 S. Ct. 1952 (1998) is:

> Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.

Adickes v. *S. H. Kress & Co.,* 398 U.S. 144, 147, n. 2, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970) (citations omitted). See also *Dothard* v. *Rawlinson,* 433 U.S. 321, 323, n. 1, 53 L. Ed. 2d 786, 97 S. Ct. 2720

(1977); *Duignan* v. *United States,* 274 U.S. 195, 200, 71 L. Ed. 996, 47 S. Ct. 566 (1927).

The misrepresentation issues were raised in the court of appeals. The Petitioners' brief to the court of appeals argued that the CUNA employees were promised life time benefits in the form of sick leave credits, and that they relied on the promised benefits. Finally, the Petitioners argued they were misled by these promises.

The court of appeals opinion and the dissent addressed the claim that the election forms misrepresented the terms of the plan. The majority casts the issue in terms that "silence" cannot form the basis for a misrepresentation claim, and that the expectations of the employees cannot trump the reservation of rights clause. (App. 8a-10a). The dissent addressed the issue and held:

> In my view, all of this language, and especially the "until it is exhausted" phrase, clearly implies a promise not to use the reservation of rights clause to wipe out the value of the retiring employee's performance – in the form of declining to use sick leave – but to use the value of the benefit of that performance for the benefit of the retiree." (App. 19a).

Additionally, Judge Hamilton specifically addressed *James v. Pirelli Armstrong Tire Corporation*, 305 F.3d 439 (6th Cir. 2002) and *In re*

Unisys Corp. Retiree Medical Benefits ERISA Litigation, 579 F.3d 220 (3d Cir. 2009). He observed:

> In cases like this one, I submit, the plan fiduciaries should know very well that plan participants were (literally) laboring based on material misunderstandings of plan benefits. (App 22a).

The misrepresentation claims were considered, and form a basis for this court to review, especially in light of the disparate decisions in other circuits. In fact, Judge Hamilton and the four dissenting judges found that CUNA breached its fiduciary duty to the plaintiffs in this case.

II. Petitioners Have Preserved the Issues Raised in Their Petition by Pleading Them in the Complaint and Arguing Them on Appeal.

Respondents' assertion that the Petitioners are raising new issues is completely unfounded. From the inception of this case, the Complaint alleged a claim for breach of fiduciary duty, a claim for promissory estoppel, and breach of a unilateral promise (SA 15-17); and the prayer for relief in the Complaint sought the precise remedies that are now acknowledged as available appropriate equitable relief provided by 29 U.S.C. § 1132(a)(3). (SA 18-19); *CIGNA Corp. v. Amara,* ___ U.S. ___, 131 S.Ct. 1866 (2011). While Respondents correctly point out that

Amara was cited in the appellate ruling below, Petitioners maintain that the Seventh Circuit's ruling is fundamentally at odds with *Amara,* which the parties had no prior opportunity to brief or argue. Indeed, the ruling below made no reference to *Amara's* recognition that misrepresentations and material omissions such the promises made to the CUNA Mutual retirees concerning their retiree health insurance are remediable pursuant to 29 U.S.C. § 1132(a)(3).

Amara held that while employee benefit plans must be enforced as written with respect to benefits claims brought pursuant to 29 U.S.C. § 1132(a)(1)(B), false and misleading information and omissions in communications provided to employee benefit plan participants nonetheless constituted a breach of fiduciary duty actionable pursuant to 29 U.S.C. § 1132(a)(3). So long as the plan participant suffered actual harm, the loss was remediable by application of either the equitable remedy of reformation of the terms of the plan, estoppel, or the equitable remedy of surcharge.

Since Petitioners pled a claim for breach of fiduciary duty as well as promissory estoppel, Respondents' assertion that the Petition seeks to recast this case is mistaken. The claims asserted and the relief sought is entirely consistent with *Amara's* suggestion that, akin to a claim for estoppel, that the plan sponsor be held "to what it promised, namely, that the new plan would not take from its employees benefits they had already accrued." 131 S. Ct. at 1880. Given the purpose

behind the ERISA equitable remedies acknowledged in *Amara;* i.e., "fair dealing, and rebuke of all fraudulent misrepresentation" *Id.* citing 2 J. Story, Commentaries on Equity Jurisprudence § 1533, at 776 (12th ed. 1877), Respondents' invocation of the reservation-of-rights language to bar Petitioners' recovery of promised retiree health benefits is inconsistent with CUNA Mutual's fiduciary obligations, and must be overruled by recognition of the plan beneficiaries' equitable rights and remedies recognized in *Amara*.

Nor can Petitioners be faulted for imperfect drafting since the Complaint was filed well before the issuance of *Amara.* What is inescapable, and utterly ignored by Respondents is that Petitioners unquestionably meet the *Amara* requirement of proving actual harm – the sick leave credits earned by not using up allotted sick leave, and premium subsidies based on a retention program that promised those subsidies based on length of service as an employee of CUNA Mutual were eliminated with the stroke of a pen (or a keystroke and mouse click); and Plaintiffs explicitly pled reasonable and detrimental reliance. SA 16-17. Accordingly, there is far more than silence as Respondents argue – Petitioners pled explicit promises and reliance thereon. SA 16-17 (Complaint ¶¶ 48-51). *Amara* controls; and this case must be heard to rectify the Seventh Circuit's inconsistency with this Court's ruling.

III. The Facts and Analysis of the *James* Decision Demonstrates That There is a Clear Circuit Split, Requiring Review by this Court.

In an effort to manufacture a distinction between the underlying facts of the instant case and the decision announced by the Sixth Circuit in *James v. Pirelli Armstrong Tire Corp.*, the Respondents state, at several points in their response, that the Election Forms at issue in this case could not be the basis for a breach of fiduciary duty, as the employees had already made the decision to retire. (Resp. Brief., pp. 5, 7, 16-17). In attempting to make this distinction, Respondents misstate in relevant part the *James* case. While all of the employees in that case had been subject to pre-retirement mandatory meetings regarding their post-retirement benefits plans, several also relied on information they received at subsequent exit interviews. *James*, 305 F.3d at 445-448 (summarizing employees' testimony regarding the information they received from the employer). One employee specifically testified that he received information in the "retirement form" that he signed. *Id*. at 446 (summarizing the testimony of Bobby Richardson). The Sixth Circuit later found that Pirelli had breached its duty toward Mr. Richardson, citing him by name, among others. *Id.* at 456.

As the parties in the instant case have yet to have their opportunity to present evidence, it is unknown to what extent the individual petitioners relied on the information in the Election Forms or to

what extent they may have second-guessed their decision to retire if they had been presented with accurate information. Instead, the Respondent, like the employer in *James*, presented false and misleading information on its own initiative. *Id.*, 456-457. The Sixth Circuit, unlike the Court below, found this sufficient for a breach of fiduciary duty. Therefore, there is a significant and important Circuit split on this issue and review by this Court is required.

IV. The Election Forms When Read Together With the Exclusive Benefit Provision of the ERISA Plan Breached the Respondent's Fiduciary Duty to Provide Accurate Information.

The purpose of the Plan is to provide a beneficiary with meaningful information.

> An ERISA plan must be in writing, ERISA §§ 402(b), 403 (29 U.S.C. § 1102(a)(1)), and it must be stated in clear, understandable terms so that the average plan participant can understands her rights. *See Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73, 83 (1995) (quoting H. R. Rep. No. 93-1280, p. 297 (1974).

A Plan is to be interpreted from the standpoint of a reasonable Plan beneficiary, not from the standpoint of a lawyer attempting to deprive beneficiaries of valuable rights, nor of a court. In

this case, the Plan includes both the reservation of rights clause and the Election Form.

The Respondent repeatedly argues that the Petitioners were not misled by the Election Form because the reservation of rights provisions was clearly stated in the Plan. This argument is flawed. The reservation of rights provision has the caveat that no amendment "shall cause any part of the Plan" to be used for purposes "other than for the exclusive benefit of the Participants or their dependents covered by the Plan." (App. 63a). The Respondent dismisses this clause as a "red herring." (Resp. Brief, p. 20). Its argument is that that caveat only applied to "tangible assets" and that the amounts allocated for future premiums were not tangible assets. (Id.)

This argument makes no sense. Had the draftsmen of the Plan meant that the "any part of the Plan" referred only to tangible assets it would have used the words "tangible assets" rather than "any part of the Plan". What further defeats the Respondent's argument is that the plan has no tangible assets—thus making the exclusive benefits clause totally meaningless using Respondent's logic.

A reasonable Plan beneficiary would believe that the exclusive benefit provision had meaning and was a significant protection to the beneficiary and dependents. The reasonable beneficiary would interpret this clause to mean that the plan could be changed but only for the exclusive benefit of the beneficiary. The reasonable beneficiary would

believe that "any part of the Plan" included how the plan would be paid for, and in this case an important part of the plan included the contributions by the Respondent. A reasonable beneficiary would conclude that the sick leave accounts and percentage contributions as stated in the Election Form were a part of the plan and that any amendment would require that the amounts stated in the Election Forms for such payments would be used for their for their exclusive benefit if the plan was amended. A beneficiary would not believe that "any part of the Plan" only referred to "tangible assets" that never existed and were never intended to exist.

When the Election Forms are considered in tandem with the "exclusive benefit" language it is obvious that the Election forms materially mislead retirees. The Election Forms were provided as part of the fiduciary responsibilities of the Plan Administrator. The Election Forms misled the beneficiaries and are a clear breach of the Respondent's fiduciary duty as a Plan administrator.

V. *James*, *Unisys* and *Devlin* Permit a Beneficiary to Prove That the Employer Misled the Beneficiary.

The thrust of *James*, *Unisys* and *Devlin* is that ERISA was adopted to protect employees. ERISA means employee retiree income security act. A primary protection is to protect the employee from being misled concerning their retirement benefits. In the above cases, retiring employees were given misleading statements

regarding that their retirement benefits could be terminated. In all cases the employer countered that the employer had provided information at other times in a reservation of rights clause that reserved the right to change retirement benefits. Nonetheless, in all cases the courts held that the employer had no right to mislead the retiree.

Ultimately, it is a question of fact whether the retiree was reasonably misled by the actions of the employer. That will require evaluating the plan provisions and other communications such as the Election Forms and to determine what a reasonable Plan beneficiary would have concluded concerning the duration of contributions to health insurance.

Contrary to the above cases, there has been no fact finding since this case is at the pleading stage. Rather, the court has held that since there is a reservation of rights clause—even one containing an "exclusive benefit provision"—that the beneficiary does not have the right to establish that the beneficiary was misled concerning rights to employer contributions to health insurance premiums. This is contrary to decisions in the Second, Third, and Sixth Circuits. It is contrary to *Amara*, contrary to the Employee Retirement Income Security Act, and contrary to logic and fair play.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari, Mr. Sullivan and all the affected CUNA retirees respectfully request that the Supreme Court grant their petition.

Respectfully submitted.

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