

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   CIGNA CORPORATION, ET AL.,                   :

4                   Petitioners                   :

5                   v.                               :   No. 09-804

6   JANICE C. AMARA, ET AL.,                   :

7   INDIVIDUALLY AND ON BEHALF OF ALL       :

8   OTHERS SIMILARLY SITUATED               :

9   - - - - - x

10                               Washington, D.C.

11                               Tuesday, November 30, 2010

12

13                   The above-entitled matter came on for oral  
14   argument before the Supreme Court of the United States  
15   at 10:07 a.m.

16   APPEARANCES:

17   THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of  
18   Petitioners.

19   STEPHEN R. BRUCE, ESQ., Washington, D.C.; on behalf of  
20   Respondents.

21   EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,  
22   Department of Justice, Washington, D.C.; on  
23   behalf of the United States, as amicus curiae,  
24   supporting Respondents.

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1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 09-804, Cigna  
5 Corporation v. Amara.

6 Mr. Olson.

7 ORAL ARGUMENT OF THEODORE B. OLSON

8 ON BEHALF OF THE PETITIONERS

9 MR. OLSON: Mr. Chief Justice, and may it  
10 please the Court:

11 Congress crafted a carefully balanced ERISA  
12 enforcement scheme that enables plan participants to  
13 recover plan benefits under section 502(a)(1)(B) and  
14 equitable remedies for ERISA violations under section  
15 502(a)(3).

16 In this case, Respondents are seeking a  
17 remedy for misleading plan summaries that violated  
18 ERISA. Their remedy, if they were harmed by defective  
19 plan summaries, is under 502(a)(3), equitable remedies,  
20 not for plan benefits under 502(a)(1)(B). The section  
21 that governs the relief that is sought is a necessary  
22 antecedent to any of the other questions in this case,  
23 and ERISA carefully structures, and this Court has  
24 repeatedly said the Court is not interested and does  
25 not -- is not willing to alter the structure that

1 Congress carefully crafted and carefully developed over  
2 the years to provide remedies with respect to ERISA  
3 programs.

4 And the scheme is such that, if there is a  
5 participant to the plan who is seeking benefits under  
6 that plan, section (a)(1)(B) of -- subsection (a)(1)(B)  
7 of section 502 provides for relief under the plan. If  
8 there are other violations of ERISA, section 502(a)(3)  
9 provides for equitable relief. That is the scheme  
10 carefully developed by Congress.

11 Now, in this case what happened is that  
12 Cigna changed its pension program, its ERISA plan, from  
13 a defined benefit plan to a cash benefit plan, a cash  
14 value plan. And it put out, as required by ERISA,  
15 summaries of the new plan that the district court found,  
16 and the court of appeals affirmed, were misleading in --  
17 in the sense that they did not provide all of the  
18 information necessary for plan participants to evaluate  
19 what was happening.

20 Now, the changes to the plan were lawful.  
21 ERISA permitted and does permit these kind of changes to  
22 an ERISA plan. There was nothing unlawful about the  
23 plan and the plan change. And the beneficiaries, the  
24 participants to the plan, did not have any choice.  
25 Cigna had the right to change the plan. It did change

1 the plan.

2 It did have an obligation under ERISA to  
3 provide accurate summaries, and the district court and  
4 the court of appeals found that those summaries were not  
5 inaccurate. In other words -- they were not accurate.  
6 In other words --

7 JUSTICE GINSBURG: Mr. Olson, when you say  
8 the employees had no choice, but the district court  
9 found, didn't it, that the reason for this plan summary  
10 being misleading was that the employer, Cigna, feared  
11 that there might be a backlash on the part of the  
12 employees if they found out, if they were told the truth  
13 about this plan; that is, that it was less favorable,  
14 that they would not have the same benefits that they had  
15 under the prior plan?

16 MR. OLSON: That is correct, Justice  
17 Ginsburg. They had no choice in the sense that Cigna  
18 could adopt a change in the plan, as it did. That was  
19 permitted under ERISA, but it was required to give  
20 accurate summaries.

21 The choice that you're suggesting and the  
22 district court was concerned about is that an individual  
23 could have left the employ of Cigna if he or she was  
24 unhappy with the change in the plan, or the district  
25 court said there could have been some sort of a protest.

1                   What we're saying is that the remedy --  
2   what was -- what was the violation is the summary  
3   itself. And we're not -- we're not challenging that  
4   here. That's a finding below. The summary was  
5   misleading, but that makes it a violation of ERISA. The  
6   summary is not the plan. And --

7                   JUSTICE KAGAN: Well, Mr. Olson, we have  
8   several times referred to the plan as having a range of  
9   documents associated with it, not as having just a  
10   single written instrument, but we referred to documents  
11   and instruments governing the plan. We did that in  
12   Curtiss-Wright, which is the case that you pin so much  
13   on. We did that in Kennedy.

14                  And the statute itself talks about that on  
15   numerous occasions, that there are documents and  
16   instruments, in the plural. And one would think that  
17   the SPD is -- is one of those documents and instruments  
18   that govern the plan.

19                  MR. OLSON: It's quite clear from the  
20   structure of the statute that is correct, as you  
21   suggest, that there may be multiple instruments or  
22   documents that are the -- create the plan itself. But  
23   the summary plan document, the SPD, is not a part of the  
24   plan. It is a separate document. It is a summary. It  
25   is a succinct statement of what might be in the plan,

1 and it must be accurate, and it must be written in  
2 comprehensible English.

3 But I would refer the Court to section 1024  
4 (b)(2) and (4), which are on pages 3a, 4a, and 5a of the  
5 blue brief. That describes the obligations that are  
6 required with respect to the summary plan document. And  
7 it describes the instruments of both the summary plan  
8 document and the instruments that constitute the plan  
9 itself in the following sentence -- and this is a  
10 similar sentence in subsection (4), but I'm reading from  
11 subsection (2), which is on 4a of the blue brief.

12 It says: "Summary plan" -- it refers to "a  
13 summary plan description and the latest annual report  
14 and" -- or other -- "and the bargaining agreement, trust  
15 agreement, contract, or other instruments under which  
16 the plan was established."

17 The construction of that sentence has to be  
18 that the summary plan description is a separate  
19 document. It is not one of those latter category of  
20 documents under which the plan was established. And the  
21 proof of that, if -- if English doesn't teach it to us,  
22 which I think it does, is the reference to the annual  
23 report. No one would say and no one would contend that  
24 the annual report is a part of the instruments creating  
25 the plan.

1 JUSTICE KAGAN: Well, I was struck by  
2 something else, Mr. Olson. I was struck by the fact  
3 that the -- that the statute saying what is in the  
4 summary plan description is packed with information that  
5 needs to be in the summary plan description. By  
6 contrast, the written instrument, which you equate to  
7 the plan, the written instrument says barely anything  
8 about what has to be in it. It just says the name of  
9 the fiduciaries has to be in the written instrument.

10 So it seems clear that this statute is set  
11 up so that everything that is important, everything that  
12 the employee needs to know and needs to rely upon, is  
13 supposed to be in the SPD, not necessarily in the  
14 written instrument.

15 MR. OLSON: Well, the written instruments,  
16 as these things turn out, are long, complex documents.  
17 They may be 90, 100 pages long. The summary, as you  
18 suggest, Congress said, yes, there is a separate  
19 document that must state in intelligible English that  
20 plan participants can understand the following things,  
21 and they must be furnished to plan participants, but  
22 they are not the plan document. The way that ERISA is  
23 structured, it --

24 JUSTICE SCALIA: Am -- are we missing  
25 something? They -- they cannot be in the SPD unless



1     they are in the plan; isn't that right?

2                   MR. OLSON:   Well -- if the -- if the --

3                   JUSTICE SCALIA:   So -- so the one cannot be  
4     more detailed than the other, can it?

5                   MR. OLSON:   The plan can be more detailed  
6     than the SPD.

7                   JUSTICE SCALIA:   Right.   But what --

8                   JUSTICE KAGAN:   But can't the SPD --

9                   JUSTICE SCALIA:   Whatever is in the SPD must  
10    be in the plan; isn't that right?

11                  MR. OLSON:   Well, if the plan is -- if the  
12    SPD complies with ERISA, yes.   It has to be --

13                  JUSTICE SCALIA:   Yes.   That's what I'm  
14    talking about, of course.

15                  MR. OLSON:   Yes.   Yes, exactly.   But not  
16    everything that is in the plan, or the plan -- as the  
17    statute says, the documents that constitute the plan  
18    need not necessarily be in the summary.   The words  
19    "summary plan" --

20                  JUSTICE KAGAN:   But, Mr. Olson, what about  
21    the opposite?   Because the statute seems to be written  
22    so that things are in the SPD which don't need to be in  
23    the written instrument.   And together, they all somehow  
24    constitute the plan.

25                  MR. OLSON:   Well, I -- I submit that that is

1 not the way the statute is written, and subsections (2)  
2 and (4) of the provision that I was referring to make  
3 that clear if the word "summary" itself did not make  
4 that clear. But the Curtiss-Wright case to which you  
5 referred to in your earlier question also proves that.

6           Curtiss-Wright case talked about a summary  
7 plan description and said it can't modify the plan --  
8 using "plan," "summary plan description," in different  
9 terms -- it cannot modify the plan, which is what the  
10 district court here held, unless the plan specifically  
11 says that it may be modified in a certain way and that  
12 the summary is an appropriate amendment to the plan. So  
13 the Court -- and this was a unanimous decision of this  
14 Court -- was referring to the summary as something that  
15 was separate, that might modify the plan if the plan  
16 itself allows for it to be modified in that fashion.

17           Now, the Government says that the summary  
18 plan description is a part of the plan and so do  
19 Respondents. And that's what the court below -- the  
20 court below didn't actually find that the SPD was a part  
21 of the plan. The court found, on the latter pages of  
22 its opinion, that it was a modification, it was an  
23 amendment to the plan. That's inconsistent with the  
24 Curtiss-Wright case because in this case the plan itself  
25 specifically says that it cannot -- does not say that it

1 can be amended by the SPD.

2 JUSTICE GINSBURG: I thought that what the  
3 district court said was that they would treat the plan  
4 as containing what the summary said, not that -- that it  
5 was part of the plan itself, not an amendment,  
6 amendment. I thought that was what the district court  
7 said.

8 MR. OLSON: I think in the -- on page of  
9 the -- this is of -- this is the summary to the cert  
10 petition, page 218, which is the district court's -- the  
11 conclusions of the district court's decision. Under  
12 Roman numeral VIII, the district court specifically said  
13 that the terms of Part B have been correspondingly  
14 modified by the SPDs.

15 The court was saying -- I think you were  
16 referring, Justice Ginsburg, to the relief that the  
17 court ordered, but the court was ordering that relief on  
18 the theory that the SPDs modified the plan. And the  
19 plan itself, under Curtiss-Wright, doesn't provide for  
20 it to be amended in that way. And the SPDs --

21 JUSTICE SCALIA: It can't be part of the  
22 plan without modifying the plan, can it?

23 MR. OLSON: That's --

24 JUSTICE SCALIA: Because it contradicts  
25 other provisions.

1                   MR. OLSON: That's correct. And the SPDs,  
2 the two SPDs themselves, on page 922a and 938a of the  
3 Joint Appendix, specifically say that if there's any  
4 discrepancy between the SPD and the plan, the plan  
5 governs. The language is at the bottom of, for example,  
6 at the bottom of 922a. So --

7                   JUSTICE KAGAN: But the SPD can't negate the  
8 force of ERISA, and if ERISA says that the summary has  
9 to be consistent with the plan documents, nothing in the  
10 SPD can negate that requirement.

11                  MR. OLSON: That's correct. No one -- but  
12 Congress did consider prohibiting a provision like that  
13 in SPDs, that they could not disclaim, they could not  
14 say that if there's any inconsistency, the plan  
15 governed, and Congress did not adopt such a provision.

16                  This is a perfectly legal provision, to tell  
17 someone that if there's any discrepancy -- and there's  
18 bound to be discrepancies, the -- as I said, the plans  
19 themselves can be 90, 100 pages, very long and very  
20 complex. That's why there is an SPD that can't contain  
21 everything in the plan.

22                  And one of the things that would be the  
23 outcome of what the Government and Respondents are  
24 urging here is that plan creators, these companies that  
25 create these plans, either will be discouraged from

1 doing it, or they will start preparing summaries that  
2 are 90 and 100 pages long so they --

3 JUSTICE GINSBURG: But they can't do that  
4 because the statute requires the summary to be  
5 understandable and not prolix.

6 MR. OLSON: That's Catch 22, because if  
7 there's a -- if there's a discrepancy because they have  
8 to be short, summary, and intelligible, then we have --  
9 we're faced with the proposition that someone's going to  
10 say, well, I read the SPD and it didn't say what was in  
11 the plan. If the SPD is as long and as detailed as the  
12 plan, then there's a violation of ERISA.

13 My point I guess in this is that, yes,  
14 Justice Kagan, the statute requires the SPD to contain  
15 certain information. We accept the fact of the  
16 conclusions of the court below in this case that they  
17 did not do so. There are two SPDs. They failed to live  
18 up to the -- to the requirements of ERISA. There is a  
19 remedy for that. It is a violation of ERISA, and it  
20 specifically says in 502(a)(3) that for violations of  
21 ERISA, equitable remedies are available. And that is  
22 what Congress decided. It is -- unless it's a part of  
23 the plan, you must go under (a)(3).

24 JUSTICE KAGAN: But the very question here  
25 is if there is an SPD that is inconsistent in some way

1 with the written instrument, what happens? Is the  
2 written instrument modified or, instead, is the  
3 provision in the SPD given operative effect? And that  
4 question is one about your benefits under the plan.

5 MR. OLSON: I would submit that it can't  
6 modify the plan unless the plan permits that. That's  
7 Curtiss-Wright. That's a unanimous decision of this  
8 Court.

9 JUSTICE KAGAN: I do think you're  
10 over-reading Curtiss-Wright. Curtiss-Wright talked  
11 about whether a particular provision satisfied the  
12 requirement that a plan have an amendment provision. It  
13 didn't say anything at all about whether there are  
14 provisions that can have operative effect regardless of  
15 whether they pass through a formal amendment procedure.

16 MR. OLSON: It seems to me -- I think we  
17 might disagree about that, respectfully. I think that  
18 the sense of the opinion in Curtiss-Wright was that if  
19 you're going to say that this SPD modifies the plan, it  
20 can only do so if the plan permits the SPD to modify the  
21 plan. Then the Court sent it back to a lower court to  
22 determine whether in fact the employees that were  
23 involved in creating the SPD there had the authority  
24 under the plan to modify the plan -- was it done --

25 JUSTICE BREYER: So far we're just

1 discussing, I take it, whether under (1) the other side  
2 is entitled to their benefits even if they weren't hurt,  
3 on a contract theory.

4 MR. OLSON: That --

5 JUSTICE BREYER: All right. But I thought  
6 we took the case to decide a different issue.

7 MR. OLSON: Yes.

8 JUSTICE BREYER: And that is -- I'll assume  
9 you're right -- it should have come under (3). But I  
10 don't know if that's harmful, whether it was (3) or (1).  
11 And the question I thought we were to decide was, if  
12 you're under (3), say, where equity is at issue, now  
13 equity is at issue and the district court says: Here we  
14 have 27,000 people, and now here's how I'm going to go  
15 about this. I'm going to look at this provision mistake  
16 here, and the mistake it seems to me was likely to cause  
17 them harm. And once that's shown -- and they showed it,  
18 it's likely to cause it harm; we can't be sure, but it's  
19 likely -- then it's up to your client to refute case by  
20 case that these guys were not -- or women were not  
21 really harmed. Okay?

22 Now, that seems very sensible to me. And --  
23 and if that's the issue we're going to decide, I'd like  
24 to hear you explain why that isn't sensible. It's an  
25 equitable matter. This is simply a way of going about

1 it. What's wrong with that?

2 MR. OLSON: Well, in the first place, it is  
3 important which section that --

4 JUSTICE BREYER: I agree, but I don't  
5 understand -- I'm with you on this one so far.

6 MR. OLSON: Okay. Okay. Because it's a  
7 different defendant. The plan is the defendant versus  
8 the plan administrator is the defendant. So that's  
9 important.

10 Secondly, (a)(3) provides only for remedies  
11 that are available in equity. Then the point that you  
12 -- that you're making with respect to what provision of  
13 equity, what is the -- what is the action that's brought  
14 and what is the remedy sought, as this Court talked  
15 about in the Varsity case, and so therefore those are  
16 those questions.

17 Now, the Second Circuit said "likely  
18 harmed." The fact is, as I pointed out at the very  
19 beginning, this was a lawful change in a plan and it's a  
20 plan where 27,000 people that were employees were  
21 participants in this plan and they would have had to do,  
22 as Justice Ginsburg suggested, either leave the company  
23 and suffer some harm or engage in some --

24 JUSTICE BREYER: You're sounding to me as if  
25 you're saying there wasn't likely harm. Okay.



1 MR. OLSON: Except --

2 JUSTICE BREYER: Are you conceding that the  
3 standard that they used, that the standard was -- the  
4 question that you raised at the beginning, whether --  
5 whether the showing of likely harm is sufficient in the  
6 absence of a rebuttal?

7 MR. OLSON: Absolutely we are not, and so --

8 JUSTICE BREYER: All right. That's what I  
9 want to hear: What's the argument against that  
10 standard?

11 MR. OLSON: Six circuit courts of appeals  
12 have held that -- that detrimental reliance is required.  
13 If -- if this is an action under (a)(3) under equity,  
14 neither the Government nor the Respondents dispute the  
15 fact that detrimental reliance would be required if  
16 you're proceeding in equity under (a)(3).

17 JUSTICE BREYER: All right. And does  
18 "likely harm" capture that idea?

19 MR. OLSON: "Likely harm" is not a  
20 demonstration of prejudicial reliance.

21 JUSTICE BREYER: Why not? Why not?

22 MR. OLSON: That's the --

23 JUSTICE BREYER: That's the kind of harm  
24 they mean. What they mean --

25 MR. OLSON: Because --

1 JUSTICE BREYER: -- by harm is they were  
2 hurt, brought about by reliance.

3 MR. OLSON: Well, in the first place, it  
4 comes out of the blue, "likely harm," as I suggested,  
5 since this was a legal, lawful change. People were  
6 going to retain their employment. They didn't have a  
7 right to opt for one or the other. If they could prove  
8 that they were -- this is --

9 JUSTICE BREYER: You object to this decision  
10 saying the following: Of course, the lower court said  
11 likely harm is necessary. As we understand it, given  
12 the context of equity, what that means here is that  
13 there was reason to believe -- reason to believe -- it  
14 was probable that, or some words like that, that there  
15 would have been harm caused by reliance on the -- the  
16 misstatement.

17 MR. OLSON: I -- that would not be justified  
18 at all. I mean, under equity, as this Court said in the  
19 Lyng v. Payne case, which is cited in the briefs, this  
20 is like an estoppel action. An essential element of an  
21 estoppel action is detrimental reliance on the adverse  
22 party's misrepresentation.

23 What the district court below did was, by  
24 coming up with this "likely harm" harm thing, is throw  
25 the burden over to the plan or the plan administrator

1 and saying: Demonstrate that any one of your -- all of  
2 your 27,000 members of this purported class somehow were  
3 hurt by a change in a plan over which they had no  
4 control, over which they had no discretion, unless they  
5 were going to leave the --

6 JUSTICE GINSBURG: But wasn't the -- wasn't  
7 the meaning of "likely harm" simply that they were  
8 promised one thing in the plan document, and so what  
9 likely harm is, is we have to do away with what they  
10 call, what is it, "the wear-away effect"? So that's the  
11 harm, the wear-away effect, and we have to remedy that.  
12 And the way to remedy it is to treat this as, what is  
13 it, instead of (a) or (b), (a) plus (b)?

14 MR. OLSON: And that would be an action to  
15 seek benefits under the plan, which would be an  
16 (a)(1)(B) action against the plan itself.

17 JUSTICE GINSBURG: Yes.

18 MR. OLSON: Against the plan. The record  
19 suggests in various parts -- I can't remember exactly  
20 which page to refer to -- that \$70 million would be the  
21 consequence of this against the plan, on which some  
22 people, depending upon how long they were with the  
23 company, when they left the company, whether they were  
24 about to retire, whether they stayed longer and the  
25 interest rates fluctuated, there can be all --

1 innumerable permutations of the effect upon persons --

2 CHIEF JUSTICE ROBERTS: Then you can't --

3 JUSTICE KENNEDY: Excuse me, Chief Justice.

4 CHIEF JUSTICE ROBERTS: Then you can't  
5 require, it seems to me, each individual to make a  
6 calculation about whether they have actually been  
7 harmed, whether there's detrimental reliance. The whole  
8 point of these plans is to give people some comfort and  
9 assurance when they are age whatever, that: Don't  
10 worry; retirement is taken care, or at least I can rely  
11 on that.

12 And your formulation would sort of put that  
13 up in the air and say: We don't know if you're going to  
14 be harmed or not; wait until you're 65 and we will see.

15 MR. OLSON: Well, Chief Justice --  
16 Mr. Chief Justice, that is the statute. The statute  
17 gives you relief with respect to a misleading plan  
18 summary under the laws of equity. The laws of equity  
19 would require that the person say -- demonstrate in some  
20 way that they were harmed. The petition -- the  
21 Respondents in this case, the named members of the  
22 class, claim that they were out 30-some thousand dollars  
23 each. They would have an incentive to bring an action  
24 by themselves.

25 JUSTICE GINSBURG: But it couldn't be --

1 MR. OLSON: Under the rules --

2 JUSTICE GINSBURG: But it couldn't be  
3 brought as a class action, and isn't that a large piece  
4 of this picture, that proceeding as they did they can  
5 proceed as a class? Proceeding under detrimental  
6 reliance, it would be hard to get a class because it  
7 would be an individual case of detrimental reliance.

8 MR. OLSON: The Rules Enabling Act provides  
9 that a class mechanism cannot change the substantive  
10 provisions of law. And so, it cannot be that, because  
11 this is brought as a class action, the rules of equity  
12 somehow change.

13 JUSTICE GINSBURG: Then the question is,  
14 under the -- under the section that the district court  
15 proceeded under, not the one that you say is proper, a  
16 class action would be appropriate.

17 MR. OLSON: A class action might be  
18 appropriate, but it would not change the detrimental  
19 reliance requirement. Again, this --

20 JUSTICE KENNEDY: Well, turning to (a)(3), I  
21 have two questions. One is, as you -- and this is  
22 probably for your friends on the other side more than  
23 you. But as you understand the "likely harm" standard  
24 that prevails in the Second Circuit, is it likely harm  
25 to a majority of the members of the class, all of the

1 members of the class? Do you know? Has the Second  
2 Circuit told us what that means?

3 MR. OLSON: Yes, well, the Second Circuit  
4 suggested, and the Government and Respondents,  
5 particularly the Respondents, say if there's a material  
6 difference, likely harm is presumed. And the Government  
7 itself says --

8 JUSTICE SCALIA: Likely harm to whom? I  
9 think that's the question --

10 MR. OLSON: That is the question.

11 JUSTICE SCALIA: -- that Justice Kennedy is  
12 asking, and I have the same question. Does it mean  
13 likely -- is it likely that the class as a whole has  
14 been harmed, or that each -- is it likely that each  
15 individual member of the class has been harmed?

16 JUSTICE KENNEDY: Or -- or a significant  
17 number?

18 JUSTICE SCALIA: Or a majority? Or  
19 whatever?

20 MR. OLSON: Yes, I --

21 JUSTICE SCALIA: What does "likely harm"  
22 mean? Do we know that?

23 MR. OLSON: And I -- I totally agree with  
24 the import of those questions. You can't describe that,  
25 in this Court --

1 JUSTICE KENNEDY: My question had no import.  
2 I really wanted to know the answer to that.

3 (Laughter.)

4 MR. OLSON: Well, the answer -- the answer  
5 is what the district court ordered and the Government  
6 seeks and the Respondents seek, is they're all harmed by  
7 this, that there's any material disparity, then  
8 everybody --

9 JUSTICE BREYER: Maybe it wouldn't be too  
10 hard. They're -- they're joined as members of the class  
11 in light of a certain set of characteristics, and the  
12 judge would find that, other things being equal,  
13 individuals who have that set of characteristics which  
14 in this circumstance make them members of the class  
15 would be harmed in all likelihood, okay? Done.

16 Now, it's up to -- it's up to the -- the  
17 defendant then to show that in a particular case this  
18 individual wasn't harmed.

19 MR. OLSON: It defies reality --

20 JUSTICE BREYER: Why?

21 MR. OLSON: -- Justice Breyer, to suggest  
22 that the 27,000 people -- each one occupy a different  
23 position in terms of the length of their employment,  
24 when they might be retiring, what their benefits might  
25 be, whether they might take a lump sum or an annuity.

1 All of those thing are different. And the only way they  
2 can --

3 JUSTICE BREYER: Well, it depends on the  
4 facts. Maybe they have a union or --

5 MR. OLSON: The only way they could have  
6 been harmed, Justice Breyer, is if they had otherwise  
7 decided to leave the employ of the company and go  
8 someplace else. They could demonstrate that.

9 If I could save my time --

10 JUSTICE KENNEDY: Your white light is --  
11 just one more thing. If you proceed under (a)(3),  
12 doesn't Mertens bar the award of -- of monetary damages?

13 MR. OLSON: I think it would. I mean, this  
14 Court --

15 JUSTICE KENNEDY: Well, then -- then you're  
16 not offering us much. You say: Oh, please go under  
17 (a)(3), but then you go back and say: Oh, well, you  
18 can't get monetary damages.

19 MR. OLSON: In the first place, that's  
20 Congress's choice. It's an equitable remedy that would  
21 be required. Congress made that decision. This Court  
22 has said it's not going to reconstruct what Congress  
23 carefully did.

24 The thing is that it would have to balance  
25 people wanting to create these plans and go into these



1 plans and the solvency and stability of the plan; what  
2 Justice Breyer is suggesting, and the Second Circuit  
3 suggested, is that you would expose plans to enormous  
4 liability because someone might think that someone might  
5 have left the employ of the -- of the company and taken  
6 a different job. That's not realistic. And -- and  
7 that's why it just came out of -- out of thin air.

8 If I may --

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 Mr. Olson.

11 Mr. Bruce.

12 ORAL ARGUMENT OF STEPHEN R. BRUCE

13 ON BEHALF OF THE RESPONDENTS

14 MR. BRUCE: Mr. Chief Justice, and may it  
15 please the Court:

16 Our position is that detrimental reliance is  
17 not found in section 102 of ERISA, which establishes the  
18 summary plan description requirement. It's not found in  
19 section 404(a)(1)(D) of ERISA, which establishes the  
20 fiduciary duty that's in accordance with the plan  
21 documents and instruments, plural, insofar as consistent  
22 with the provisions of this title.

23 It's also not consistent with any language  
24 in section 502(a), either in 502(a)(1)(B) or 502(a)(3).  
25 The reference to equitable relief is to appropriate

1 equitable relief to redress a violation of Title I or a  
2 violation of the terms of the plan.

3 JUSTICE KENNEDY: Well, that seems to me  
4 like just a roundabout, complex way of saying that you  
5 must recover under the plan, because if reliance is not  
6 required then there must be some basis on which you must  
7 recover, and that recovery must be under the plan. So  
8 it's -- it's --

9 MR. BRUCE: Well, the -- the --

10 JUSTICE KENNEDY: I mean, if you say -- if  
11 you say injury is not required, then -- then I don't see  
12 how the SPD can give you recovery, unless the SPD is the  
13 plan, which brings us right back to the argument, which  
14 is your argument, under the first -- under the first  
15 section, under (a) --

16 MR. BRUCE: Under either (a) --

17 JUSTICE KENNEDY: -- (a)(1), (a)(1).

18 MR. BRUCE: Under -- our understanding is  
19 that under either (a)(1)(B) or (a)(3), that the court is  
20 effectively providing an injunction in a case like this,  
21 where -- where an action violates the statute. And here  
22 a plan provision which had a very detrimental effect on  
23 people was not disclosed to them, and so the effect of  
24 the statute is to make that unfavorable provision  
25 ineffective. And so --

1 JUSTICE ALITO: If the -- if the SPD is part  
2 of the plan, then where does the "likely harm" standard  
3 come from?

4 MR. BRUCE: I think, as we've said in our  
5 brief, we think that the likely harm, possible  
6 prejudice, and the material conflict that -- that is  
7 used in the Third Circuit in Burstein, we think that all  
8 of those standards are very similar, that they are  
9 really looking at whether it --

10 JUSTICE ALITO: No, but why is there any  
11 requirement whatsoever, other than the fact that it's in  
12 the plan? If the SPD is the plan and the SPD says you  
13 get certain benefits that you wouldn't get under the  
14 written document, then -- the previously executed  
15 written document, then you get the benefits under the  
16 SPD, period. It doesn't matter whether there's likely  
17 harm or reliance or anything else, right?

18 MR. BRUCE: Well, I think, Justice Alito, we  
19 see this more as a nondisclosure issue, that the  
20 unfavorable provisions in the plan were not disclosed,  
21 and that the effect of the statute is to make those  
22 unfavorable plan provisions ineffective. But because  
23 the statute refers to, for example, material  
24 modifications and being sufficiently comprehensive and  
25 reasonably apprising, that there are enough

1 qualifications in there where the court can look and  
2 see, is this really -- was this conflict, was it really  
3 about something that was significant to people that  
4 might have an impact on their decision making and  
5 whether the terms of their employment are satisfactory,  
6 whether they might want to seek another job, they might  
7 just go into the office and say: We need more benefits.

8 CHIEF JUSTICE ROBERTS: It seems to me that  
9 it's a very tough argument to say -- to make a  
10 nondisclosure claim on the theory that the summary is  
11 part of the plan, because the whole point of a summary  
12 is not to disclose everything. If it disclosed  
13 everything, it wouldn't be a summary. And if you can  
14 claim something because it didn't disclose it, it seems  
15 to me that's in tension with the idea that it's not  
16 supposed to be just a repetition of the plan.

17 MR. BRUCE: Our position is that the SPD is  
18 one of the documents or instruments governing the plan.  
19 And by statute it's required to have certain -- to meet  
20 certain requirements, and therefore it becomes a  
21 document governing the plan. It is -- in response to  
22 Mr. Olson, it is referred to as a document in section  
23 1024(a)(6) of the statute, and of course this Court has  
24 repeatedly referred to it as a plan document and to  
25 "plan documents" plural. So, what --

1 JUSTICE GINSBURG: But there's -- I think  
2 the brief -- the Petitioners' brief pointed out, it  
3 governs the plan only when it's more favorable to the  
4 participants, because you wouldn't say, if the plan were  
5 more favorable and the summary would show fewer  
6 benefits, that the summary would then govern.

7 MR. BRUCE: I think the -- the  
8 favorable/unfavorable is that the way -- the way I see  
9 it is that an unfavorable plan term, when you look at  
10 Curtiss-Wright, an unfavorable plan term must be validly  
11 adopted and it must be disclosed in accordance with  
12 ERISA in order to be effective.

13 And so, in the Frommert v. Conkright case,  
14 that was specifically what the Second Circuit held, was  
15 that the summary plan description did not disclose the  
16 phantom offset, and therefore the phantom offset was  
17 ineffective. Here the summary plan description did not  
18 disclose the wear-away provisions. People's normal  
19 expectation is that if they are under a pension plan and  
20 they are continuing to work, that they are continuing to  
21 earn pension benefits. So that the SPD was not  
22 apprising them that there were unfavorable provisions in  
23 the plan, which were validly adopted, but which were  
24 secret as far as they were concerned.

25 JUSTICE KENNEDY: So there's a -- there's a

1 presumption that everything in the plan is favorable? I  
2 still don't see how you get it both ways. If it -- if  
3 it understates the benefits, that doesn't count?

4 MR. BRUCE: The -- the Congress in ERISA is  
5 concerned with unfavorable effects on participants.  
6 It's about protecting employee rights. So the focus is  
7 on losses of benefits, and there is a specific provision  
8 in the regulations and in the statute about disclosing  
9 all the circumstances that can result in a loss of  
10 benefits. So there was a plan provision here which  
11 caused the loss of benefits that was never disclosed to  
12 people. And it was -- there was no baseline where  
13 people knew, well, the plan document may have a  
14 wear-away provision, and the SPD doesn't mention it and  
15 therefore there is no wear-away.

16 They didn't know what wear-away was. They  
17 don't know what wear-away is today, because it has never  
18 been disclosed to them that there's a way to -- to rig  
19 up a pension plan where you can have a period of years,  
20 unbeknownst to you, where you're not earning any an  
21 additional benefits.

22 JUSTICE BREYER: Okay. Are you finished  
23 with that?

24 MR. BRUCE: Yes. Sorry.

25 JUSTICE BREYER: If you're finished. As I

1 understand what you have been saying and written, you  
2 don't mean that the SPD, the summary, is a contract? I  
3 mean, one thing would be to say it's a part of the plan  
4 and moreover it's a contract, so therefore we enforce it  
5 according to terms. That's one view.

6 But if you took that view, you get into  
7 problems such as were mentioned. The employer would  
8 write 10,000 pages because he knows it's an enforceable  
9 contract. Nobody would understand it. You'd have to  
10 worry about the time when it was less favorable than the  
11 written document. So call it a plan if you want, as  
12 long as you don't mean it's an enforceable contract.

13 Now, there's a provision that deals with it,  
14 saying just what you said in response to Justice Alito.  
15 And what I don't understand is why wouldn't that  
16 provision govern? I take it there's a provision,  
17 1054(g)(1), that says a plan cannot reduce the rate of  
18 accrual of future benefits unless there's written notice  
19 in a manner calculated to be understood by the average  
20 plan participant.

21 So I would have thought, I read that, I get  
22 what you've said in your brief. The summary was  
23 inadequate. It wouldn't have been understood, and,  
24 therefore, according to this particular provision, those  
25 provisions in the plan that reduce benefits are void.

1     So now we enforce the plan with the -- in the absence of  
2     those particular void provisions, and you get what you  
3     want. Now, I thought that makes a lot of sense to me,  
4     except I don't see that anywhere in this case.

5                 MR. BRUCE: Now --

6                 JUSTICE BREYER: So there's some reason it  
7     doesn't seem to appear in the opinions. It doesn't  
8     appear in the briefs. It doesn't appear anywhere until  
9     you just mentioned it in response to Justice Alito, or  
10    seemed to.

11                MR. BRUCE: No, it is in the opinion.

12                JUSTICE BREYER: It is?

13                MR. BRUCE: The district court found a  
14    violation. It's 1024(h) -- it's 204(h) of ERISA, that  
15    that provision -- the district court found a violation  
16    of that provision, which if the court had provided  
17    relief would have resulted in the class receiving much  
18    more relief than the court ultimately ordered; that it  
19    would have resulted in the class receiving four or five  
20    times as much relief, because they would have just been  
21    put back under the old pension formula.

22                JUSTICE SCALIA: What is that provision?

23                JUSTICE BREYER: (h). He's right, it's (h).

24                JUSTICE SCALIA: Does it appear anywhere in  
25    -- in the briefs? 1024(h), does it appear anywhere in



1 the briefs?

2 MR. BRUCE: It appears in our petition for  
3 certiorari, because after the district court found a  
4 violation of it, the district court declined to provide  
5 relief because there had been an intermediate interim  
6 amendment that might have --

7 JUSTICE BREYER: I understand that. So  
8 suppose we can't reach that, which would seem to be the  
9 logical thing to govern this, but we can't, okay? Then  
10 we only have two choices. The first choice is (1)(b),  
11 which seems to -- you want to use that by treating the  
12 summary as a contract, or we go to (3), in which case  
13 we're under equity.

14 Now, between those two, the first one gets  
15 all the problems that we just were talking about. The  
16 second one would seem to be you're free and clear as  
17 long as you show some kind of reliance and harm, and  
18 then we're back to what I thought we granted this for,  
19 which is why not say if harm is likely, then the burden  
20 shifts?

21 JUSTICE SCALIA: Why not?

22 MR. BRUCE: That's -- that's -- that's one  
23 way that it would be -- that was the way it's approached  
24 under the Securities Act, where there is an express  
25 reliance requirement.

1 JUSTICE BREYER: What happens in a trust law  
2 where, let's say, there are 10 or 50,000 beneficiaries  
3 in a trust, and -- and the trustee has indeed made an  
4 error. And now they can recover money only if, only if  
5 there really has been harm. Now, how do the -- how does  
6 trust law work that out? This can't be the first time  
7 this ever arose in history. We have a big class, and --

8 MR. BRUCE: Well, I -- we didn't go based on  
9 a trust law case involving a big class, but we based it  
10 on Bogert and on section 173 in the Restatement of  
11 Trusts, that when there is a breach of the duty to  
12 disclose all of the material information that the  
13 beneficiary needs to know in interacting with a third  
14 party, which in this case would be Cigna with respect to  
15 their employment, that then there is no requirement of  
16 proving reliance; that the trustee can prove -- as the  
17 Second Circuit set up, that the trustee can try and  
18 prove that the beneficiaries have all the information  
19 that they needed.

20 JUSTICE KENNEDY: So you say under standard  
21 trust law once you show there's a breach, the burden  
22 shifts to the trustee to show that there's no harm?

23 MR. BRUCE: For a breach of the duties to  
24 the --

25 JUSTICE KENNEDY: I mean, I understand that

1 to be the Second Circuit rule, but I didn't understand  
2 that to be the rule generally in the law of trusts, and  
3 I quarrel with the Government's brief on that. I think  
4 the Government's brief is quite wrong to suggest that  
5 this is part of the law of trusts.

6 MR. BRUCE: Now, I --

7 JUSTICE KENNEDY: Now, it could be the law  
8 of ERISA under the Second Circuit, but that's something  
9 quite different.

10 MR. BRUCE: My understanding is -- I mean,  
11 that's the law that's been -- that this Court has  
12 adopted in securities cases where we have nondisclosures  
13 to broad classes, is that there's a presumption of  
14 reliance, which -- because it's unrealistic for  
15 thousands of people to prove reliance in -- in --

16 JUSTICE KENNEDY: But that's not under  
17 trust -- trust law, or correct me if I'm wrong.

18 MR. BRUCE: Well, that's -- that's what I'm  
19 saying, that there's a commonality between the  
20 securities cases, trust law as stated in the -- in the  
21 comment to section 173 and in Bogert, and what the  
22 Second Circuit is doing.

23 CHIEF JUSTICE ROBERTS: Could I just stop --  
24 the securities cases, does that involve stock traded in  
25 a market, in which case the inference of harm would be

1 much more obvious and follow more logically than in the  
2 trust context?

3 MR. BRUCE: Well, one -- one of this Court's  
4 very first ERISA cases was Teamsters v. Daniel, in which  
5 the Securities and Exchange Commission had considered  
6 pension plans to be a security. And -- and the case  
7 actually involved break-in-service rules, and this Court  
8 concluded that whatever protections the securities laws  
9 offered, potentially offered, to participants were now  
10 offered in more concrete form under ERISA.

11 But the -- the point that I want to get back  
12 to on reliance is that my reading of this Court's  
13 decision in Bridge and in Lyng v. Payne is that this  
14 Court does not look for the closest analogy to a  
15 statutory provision. The question is: What did  
16 Congress do in enacting this statutory provision?

17 JUSTICE ALITO: Could I ask you this: If  
18 this were an individual action and it -- and it were  
19 under (a)(3), what would either the plaintiff or the  
20 defendant have to show, depending on what the burden --  
21 who has the burden, on the issue of likely harm?

22 What would "likely harm" mean in that  
23 context? The person was likely to have left the  
24 employment of the company, or what? What else?

25 MR. BRUCE: "Likely harm" can include

1     that the -- that if the person knew about the provision,  
2     they might have asked for the provision to be changed.  
3     They might have asked for a different compensation  
4     package. They might have asked -- they might have taken  
5     personal kind of self-help steps to protect themselves  
6     so that they might have -- have, you know, decided to  
7     have their wife work longer. They might have decided to  
8     work longer themselves. They could have saved and saved  
9     differently.

10                 There's both the -- the steps that you can  
11     take in relation to your employment and the steps that  
12     you can take on a personal basis.

13                 JUSTICE BREYER: Could they here have  
14     gone -- could they also have said to the company: Look,  
15     why are you doing this? If interest rates fall, we're  
16     going to lose money. But interest rates might rise, and  
17     if interest rates rise, you'll lose money. So we're  
18     risk-averse, so what we would like to do is just make  
19     sure we get the same pension that we would under Plan A,  
20     and then if there's more on Plan B, add it in, and we'll  
21     risk the fact that interest rates might have gone up.

22                 MR. BRUCE: The district court --

23                 JUSTICE BREYER: So they could -- they might  
24     have talked the company into it.

25                 MR. BRUCE: Well, the district court found

1     that there was a real prospect of employee backlash if  
2     the employees knew about these benefit reductions.  It's  
3     well-established in behavioral economics that people are  
4     very averse to losses.  So if a -- if the statute and  
5     the regulations are requiring the loss to be disclosed,  
6     it isn't going out on a limb to say that there's going  
7     to be a reaction to that.

8                     And here, Cigna knew that there was a  
9     reaction to that, and they had examples from the press  
10    of with Deloitte & Touche had had a similar situation  
11    where they had to roll back the cash balance changes  
12    because employees were so upset.

13                    I think, in response to Justice Alito's  
14    question, the -- I don't think that the individual has  
15    to -- that if the individual has to prove possible  
16    prejudice, then I think that, as -- as our district  
17    court ruled here, then I think the standard inevitably  
18    becomes very close to actual prejudice.  And so I think  
19    that the possible prejudice is really to the employee  
20    group.  It's to the -- the statute is in terms of the  
21    average plan participant.  It's all based on objective  
22    standards.

23                    JUSTICE KENNEDY:  Under your proposal, I  
24    assume, if you prevail, under your position, the -- the  
25    summaries will now become part of the plan.  So that

1 even if there's no intent to mislead, there can be a  
2 class action if the -- if the SPD is in anyhow at  
3 variance with the plan --

4 MR. BRUCE: Well, as we --

5 JUSTICE KENNEDY: -- and to the -- to the  
6 detriment of the employee.

7 MR. BRUCE: Well, as we said in the brief,  
8 there are already cases that -- that recognize  
9 exceptions to liability here, and one of them is for  
10 prompt correction of any problem. So if you have the  
11 unintentional error in that unintentionally the  
12 wear-away provisions weren't disclosed, well, then the  
13 issue is: Why wasn't that corrected at any point in  
14 time? We're now 12 years out, and Cigna has never  
15 disclosed those wear-aways to anyone.

16 JUSTICE ALITO: If an administrator -- if an  
17 administrator issues a summary plan description that is  
18 100 pages long and is basically the same thing as the  
19 written instrument, and that's a violation of the  
20 requirement in ERISA that it be a summary and that it be  
21 intelligible to ordinary readers, what remedy is  
22 available to a beneficiary?

23 MR. BRUCE: I think -- I think that that's  
24 -- obviously, injunctive relief in terms of an order to  
25 correct that would be available. I think in terms of --

1 of affecting the benefit offers, of saying, well, is  
2 a -- if the SPD is identical to the plan document, is  
3 there any -- there are no undisclosed plan provisions,  
4 then. So it becomes -- it becomes more difficult in  
5 terms of relief, but obviously there would be relief for  
6 the understandability requirement.

7 JUSTICE ALITO: Well, doesn't that put  
8 the -- think of the incentives for the administrator in  
9 that situation or for the plan sponsor. If you issue a  
10 succinct SPD, you risk misleading the recipients as to  
11 the contents of the plan, and you may have financial  
12 liability.

13 If, on the other hand, you issue -- you err  
14 on the side of issuing an SPD that is comprehensive,  
15 well, the worst that can happen, according to what you  
16 just said, is you can be faced with an injunction to  
17 provide a more concise and comprehensible statement.

18 MR. BRUCE: Well, intentional errors should  
19 not be countenanced, and here Cigna was deliberately  
20 misleading employees. If it's an unintentional error,  
21 then it should be promptly corrected.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 MR. BRUCE: Thank you.

24 CHIEF JUSTICE ROBERTS: Mr. Kneedler.

25 ORAL ARGUMENT OF EDWIN S. KNEEDLER



1           ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
2                           SUPPORTING RESPONDENTS

3                   MR. KNEEDLER:   Mr. Chief Justice, and may it  
4   please the Court:

5                   The pension benefits an employee accrues  
6   while she works are a major component of her  
7   compensation for working, just as her wages are. The  
8   employee is entitled to receive those benefits and to  
9   recover them if they are withheld without any  
10   particularized showing of detrimental reliance, just as  
11   she is entitled to recover the wages that were promised  
12   to her.

13                  JUSTICE KAGAN:   Well, Mr. Kneedler, do you  
14   view this as essentially a contract case, as that just  
15   suggested, or instead a trust case?

16                  MR. KNEEDLER:   We view it as basically a  
17   contract case. In Firestone, the Court referred to  
18   contractually -- contractually guaranteed benefits,  
19   those under the plan. And the reason we think that  
20   here, in this case the district court found that the SPD  
21   basically promised, represented to employees, that after  
22   the conversion they would receive pension benefits in  
23   the form of A plus B, the old benefits plus the new  
24   benefits, accruing right away.

25                  ERISA -- the scheme of ERISA is that the SPD

1 is often -- typically the only document that the  
2 employee receives to inform him or her about the  
3 contents of the plan.

4 JUSTICE ALITO: If this is a contract case,  
5 then where does the "likely harm" standard come from?  
6 If I'm owed something under a contract, I'm entitled to  
7 get that under the contract. I don't need to show that  
8 I was likely harmed by, that I relied in any -- in any  
9 way on anything.

10 MR. KNEEDLER: Right. We do not think  
11 detrimental reliance -- and I think it works out --

12 JUSTICE ALITO: Do you think likely harm is  
13 required?

14 MR. KNEEDLER: In this sense: If the -- if  
15 the SPD contains these sorts of representations such  
16 that the employee could reasonably be expected to rely  
17 upon them in defining her benefits, then that controls.  
18 The likely harm is not being told, or being told  
19 something different from what the underlying plan says.

20 JUSTICE SCALIA: But the likely harm --

21 MR. KNEEDLER: That could be rebutted --

22 JUSTICE SCALIA: That's not the likely harm.  
23 That's the breach. That's the offense.

24 MR. KNEEDLER: But the --

25 JUSTICE SCALIA: You're saying once you make

1 the offense, you have to cough up what you stated in the  
2 -- in the summary.

3 MR. KNEEDLER: Unless the participant  
4 actually knew or couldn't reasonably depend upon it.  
5 Actually knew -- for example, this was the case in the  
6 Govoni case in the First Circuit, that -- whose  
7 formulation is the one that other courts typically  
8 follow. That was the situation where the employee found  
9 out before she retired what the true facts were, and,  
10 therefore, there could have been no claim of harm or --  
11 or that the --

12 JUSTICE SCALIA: Well, then it's not  
13 contract.

14 JUSTICE KENNEDY: The minute you get away  
15 from contract --

16 JUSTICE SCALIA: Is it contract or not  
17 contract?

18 MR. KNEEDLER: No, it is contract,  
19 because -- because in that -- it -- it -- the question  
20 is: What is the contract? To the employee, typically  
21 the SPD is the only thing that is the contract that --

22 JUSTICE BREYER: But the SPD is written by  
23 the fiduciary.

24 MR. KNEEDLER: Yes.

25 JUSTICE BREYER: And the other is written by

1 the -- by the person who is giving the money, the  
2 employer. So now you're saying that it's a contract,  
3 even though it wasn't written by the employer and even  
4 though it could differ in dozens of ways from the actual  
5 -- from the actual plan document. Sometimes they'd be  
6 favorable to the employee, sometimes they'd be  
7 unfavorable, sometimes they'd be different but neutral.  
8 So what's the judge supposed to do? Forget about the  
9 basic document and just enforce this thing written by  
10 the fiduciary?

11 MR. KNEEDLER: Well, but the underlying  
12 formal document is -- is what controls, unless the SP --  
13 unless there's a conflict. This case --

14 JUSTICE BREYER: Well, I said that there can  
15 be conflicts, sometimes favorable to the employee,  
16 sometimes unfavorable, sometimes neutral. So what we  
17 have is a document that's, by the way, supposed to be  
18 short, but I guess if we took your view it wouldn't be  
19 short anymore. And -- and it -- it could differ in any  
20 one of three ways; and I could think of seven other  
21 ways.

22 So -- and we'll find seven others. So, what  
23 -- how is a judge supposed to react? Is he supposed to  
24 say that this two-page document is the contract, is the  
25 contract, and there are all kinds of conflicts -- what's

1 supposed to happen?

2 MR. KNEEDLER: It forms -- it forms part of  
3 the contract. And cases of conflicts between the SPD  
4 and the -- and the formal plan document are not common,  
5 and they shouldn't be, because the SPD -- the  
6 administrator or the employer has an obligation to  
7 make sure --

8 JUSTICE BREYER: That isn't my question. My  
9 question is: One, why should a document written by a  
10 different person, the fiduciary, govern over the actual  
11 plan? Second, what happens when you have a favorable  
12 conflict? What happens when you have an unfavorable  
13 conflict? What happens when you have a neutral  
14 conflict?

15 MR. KNEEDLER: As to --

16 JUSTICE BREYER: How should it be worked  
17 out?

18 MR. KNEEDLER: As to the first point, it is  
19 -- it is common, and it was critically true here, that  
20 the -- that the employer, the plan sponsor, is involved  
21 in -- in drafting the SPD. This was an SPD that was  
22 issued in conjunction with the plan amendment, and the  
23 SPD and the plan amendment --

24 JUSTICE BREYER: I think the fact that this  
25 individual in this case happened to be the same group or

1 person is beside the point of my question.

2 MR. KNEEDLER: Okay. And -- and so the --  
3 the second point is, I -- I think it would be useful for  
4 the Court to look to the experience of certificates of  
5 insurance under group insurance plans. That is the most  
6 directly analogous circumstance in our view. It is the  
7 prevailing position in the courts, and it has been for  
8 some time, that where an employee -- or employee under a  
9 group health plan or pension plan receives a certificate  
10 of insurance that sets forth certain elements, essential  
11 elements of the plan, and the -- an underlying insurance  
12 policy is in conflict with that, that the certificate of  
13 insurance governs, for the same reason that the SPD  
14 governs --

15 JUSTICE SCALIA: Is this governed by ERISA  
16 or are these things governed by ERISA?

17 MR. KNEEDLER: Some of them may be and some  
18 of them may not be. I mean, it --

19 JUSTICE GINSBURG: So where does the rule  
20 come from, then?

21 MR. KNEEDLER: The -- the rule is a common  
22 insurance rule that in -- in the group insurance  
23 situation, where you have an underlying policy that the  
24 individual insured is not going to see.

25 JUSTICE SCALIA: But we have a statute here

1    which says that it is the plan that governs.  I mean,  
2    that -- that's -- don't you think that's a crucial  
3    difference?

4                   MR. KNEEDLER:  Well, but there's -- it's  
5    also a statute that, as this Court said in  
6    Curtiss-Wright, that the SPD is designed to -- to  
7    furnish the employee the essential information under the  
8    plan.

9                   JUSTICE BREYER:  Is that true of the  
10   certificate of insurance?  Is a certificate of insurance  
11   a simple document that any consumer is able to  
12   understand or -- or is supposed to be?

13                   MR. KNEEDLER:  That's what -- that is what  
14   it's supposed to be.  And importantly in that --

15                   JUSTICE BREYER:  Is there an example I could  
16   look at?  Find one, on line --

17                   MR. KNEEDLER:  I'm not sure.  There's not in  
18   the record in this case, but -- but we cite some  
19   insurance treatises.  And a further point I want to  
20   make, that --

21                   JUSTICE SCALIA:  Do they use a likely harm  
22   standard?  Is that where the likely harm standard comes  
23   from?

24                   MR. KNEEDLER:  No, the likely harm standard  
25   was a formulation of the -- of the Second Circuit.  I --

1 JUSTICE SCALIA: That's nice. Where did  
2 they get it from?

3 (Laughter.)

4 JUSTICE SCALIA: They just made it up?

5 MR. KNEEDLER: Well, I -- I think it was --  
6 it was an effort to judge whether the -- whether the  
7 particular statements in the SPD were of the sort  
8 that -- I think it really gets at materiality, whether  
9 the statement's material.

10 JUSTICE KAGAN: Mr. Kneedler, I -- I think  
11 it's a hard question here as to whether to think of this  
12 as more like a contract dispute or more like a -- a  
13 trust issue.

14 If we were to look at it as a trust issue,  
15 what would be the result of that? What kind of test  
16 would we use?

17 MR. KNEEDLER: I think it would be -- I  
18 think it would be the same thing where you -- where you  
19 have a -- either in this case an affirmative  
20 representation of what the -- of what benefits will be  
21 due, or you could have a situation where there was a --  
22 a failure to disclose.

23 JUSTICE KENNEDY: Well, if it's a contract  
24 case as you're submitting, then the burden-shifting  
25 rules, it seems to me, that apply in trusts don't apply.



1                   MR. KNEEDLER: Well, the burden-shifting  
2 rule would apply to the extent of enabling the  
3 administrator of the plan or the employer to demonstrate  
4 that the employee actually knew or that there were other  
5 documents that would have informed the employee so that  
6 he would not have been misled by the statements in the  
7 -- in the SPD.

8                   JUSTICE KENNEDY: Well, and in all of  
9 that --

10                  MR. KNEEDLER: You have brochures --

11                  JUSTICE KENNEDY: -- I think, under trust  
12 law, there has to be a showing of breach and harm before  
13 there is -- the burden shifts on causation. And your  
14 brief left out the -- you indicate the burden shifts  
15 just so long as you show that there is a misstatement.

16                  MR. KNEEDLER: Well, there is harm, because  
17 the employee was not told of what the -- of what the  
18 terms of his -- of his deal were.

19                  JUSTICE GINSBURG: Mr. Kneedler --

20                  MR. KNEEDLER: He goes to work every day  
21 expecting to earn his wages and expecting to earn the --  
22 the benefits set forth in the SPD. And in --

23                  JUSTICE GINSBURG: Do you put -- do you put  
24 any weight on Congress insisting that the summary, that  
25 each -- each participant get a copy of that summary, but

1     there's no such requirement with respect to the plan?

2                   MR. KNEEDLER:   That's -- that is critical to  
3     our position.  And, again, the insurance/certificate of  
4     insurance analogy, it's all the same reasons that we say  
5     under ERISA, that that's the only document that is  
6     given, it's given for the obvious purpose of -- of  
7     telling the employee the essential aspects of the deal  
8     that he's going to get, and ERISA identifies, itemizes  
9     what they are and requires that the plan administrator  
10    not -- not minimize what they are.

11                  JUSTICE SCALIA:   So it can't -- it can't  
12    amend the plan, contrary to what we've said.

13                  MR. KNEEDLER:    It's not -- it's not an  
14    amendment to the plan.

15                  JUSTICE SCALIA:   It's not an amendment?

16                  MR. KNEEDLER:    The SPD -- the SPD is part of  
17    the plan, and as far as the --

18                  JUSTICE SCALIA:   Well, wait -- wait.  It's  
19    part of the plan, but the other part of the plan  
20    contradicts this part of it.  And -- and you say it is  
21    this part, the SPD, that governs, which means it amends  
22    the prior part, right?

23                  MR. KNEEDLER:    It -- it controls.  I -- it  
24    doesn't formally -- it doesn't formally --

25                  JUSTICE SCALIA:   Oh, all right, okay.  We'll

1 say it controls. Does that make you feel better about  
2 it?

3 MR. KNEEDLER: Well, that -- that's the  
4 explanation --

5 JUSTICE BREYER: Does it control when it's  
6 less favorable?

7 MR. KNEEDLER: It does not. The --

8 JUSTICE BREYER: Oh. It only controls when  
9 it's more favorable, but not when it's less favorable.

10 MR. KNEEDLER: Because --

11 JUSTICE BREYER: What theory of contract law  
12 gets you to that conclusion?

13 MR. KNEEDLER: Because you have two  
14 different documents that may be part of the contract.  
15 It's an effort to find out what the deal is. Under the  
16 insurance cases that I mentioned, what the courts  
17 says -- what the courts say is the certificate becomes  
18 part of the contract, but those cases also say when  
19 the -- when the plan is more favorable, that the plan  
20 governs because that -- under ERISA, that is the  
21 operative plan document that the administrator is  
22 supposed to operate under day to day.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 Mr. Kneedler.

25 Mr. Olson, you have 4 minutes remaining.

1 REBUTTAL ARGUMENT OF THEODORE B. OLSON

2 ON BEHALF OF THE PETITIONERS

3 MR. OLSON: Thank you, Mr. Chief Justice.

4 I'd like refer first of all to what  
5 Respondents said in -- in response to a question from  
6 you, Justice Breyer, about section 204(g). And you --

7 JUSTICE BREYER: (j).

8 MR. OLSON: Well, (g), I'm talking about.  
9 That's what they -- I refer you to page 212 of the cert  
10 petition appendix under Roman numeral VI, where the  
11 district court specifically said: Plaintiffs also seek  
12 to assert their claim under ERISA's anti-cutback  
13 provision, 204(g). That claim has been rejected in the  
14 liability decision. That claim was raised; it was  
15 rejected in the liability decision. It's not here  
16 anymore.

17 Section -- the real section that the Court  
18 should refer to in 204, is 204(h) -- (h)(6)(A) of ERISA,  
19 and I can't point to the portion of the appendix, but  
20 that was an addition by Congress in 2001 to deal with  
21 egregiously inaccurate notices of change. That -- and  
22 Congress amended ERISA in 2001, added that provision,  
23 and said, if there's an egregious violation of that  
24 provision, then you get all the benefits that you should  
25 have gotten.

1           That's what Congress can do if it wishes to  
2 do. That's what's being sought in this case. Congress  
3 can take care of this if it wishes, but Congress enacted  
4 a carefully reticulated scheme; you're either suing for  
5 benefits under the plan or you're suing for violations  
6 of ERISA.

7           JUSTICE SCALIA: Why didn't that (h) apply  
8 here? Was it not egregious enough? Is that -- is that  
9 why it didn't apply? Or they just forgot about it or  
10 what?

11           MR. OLSON: I -- I don't think that the --  
12 the notice that was involved was referring to the SPD.  
13 The SPD, to the extent that it violates ERISA, there is  
14 a remedy that still exists; Congress hasn't changed.  
15 It's in (a)(3). It must be an equitable remedy. You  
16 can seek an injunction.

17           And to the extent the Court is concerned  
18 that that's an empty remedy, that that's not a  
19 sufficient remedy, that's what Congress decided; and we  
20 referred in footnote 3 of our reply brief of a number of  
21 cases that -- that circuit courts have handled  
22 demonstrating detrimental reliance and providing for  
23 remedies.

24           JUSTICE BREYER: Yes, but I still have the  
25 same question Justice Scalia had, which is -- which is

1    why didn't this (h) thing apply here, because they  
2    didn't have -- their claim, the notice wasn't good, and  
3    if the notice wasn't good, then -- the plan didn't  
4    change, and if the plan didn't change, they should have  
5    gotten the money. Why didn't it -- why?

6                   MR. OLSON: That provision doesn't apply to  
7    the SPD, and they did not bring that case. I don't  
8    know --

9                   JUSTICE SCALIA: Why doesn't it apply to the  
10   SPD? Isn't that a notice?

11                  MR. OLSON: I think it's a different type of  
12   notice that -- under that provision.

13                  JUSTICE SCALIA: I thought it says --

14                  JUSTICE ALITO: Well, there was a -- there  
15   was notice, wasn't there?

16                  MR. OLSON: There was a notice.

17                  JUSTICE ALITO: And is the claim based on  
18   that, or is it based on the SPD?

19                  MR. OLSON: The claim is based upon the SPD,  
20   and the district court decided that the SPD had amended  
21   the plan. And that's inconsistent with what the statute  
22   provides.

23                  JUSTICE KAGAN: Mr. Olson, on your view of  
24   showing detrimental reliance, I take it you would  
25   require each employee to come forward and say yes, I

1 read this SPD; is that correct?

2 MR. OLSON: Yes. And trust law --

3 JUSTICE KAGAN: And doesn't that really  
4 misunderstand the realities of the workplace? Very few  
5 people read their SPDs, but you only need one person to  
6 read the SPD to come in and say, by the way, folks,  
7 21,000 of us are not getting our retirement benefits for  
8 the next few years. And within a day, every employee in  
9 the workplace is going to know about that. So doesn't  
10 this give an incredible windfall to your client, Cigna,  
11 or to other companies that commit this kind of  
12 intentional misconduct if you hold them to this  
13 detrimental reliance standard?

14 MR. OLSON: The -- I refer to what  
15 Justice Kennedy was referring to. To the extent that  
16 we're talking about trust law, we're talking about the  
17 requirement of a loss. I would say that a person would  
18 not necessarily have to have read the SPD but have been  
19 aware of it and taken some steps in connection with it.  
20 And that's the evidence that would have to be  
21 established, and there's no -- and every court has said  
22 that under (a)(3) equity requires detrimental reliance.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 Mr. Olson.

25 The case is submitted.

1                   (Whereupon, at 11:08 a.m., the case in the  
2   above-entitled matter was submitted.)

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