No. 19-2930

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN J. CUNNINGHAM; DAVID CIUFFETELLI; BENJAMIN DIDONATO; JOHN RUCKI, JR., on behalf of himself and all others similarly situated,
Plaintiffs-Appellees,

v.

WAWA, INC.; RETIREMENT PLANS COMMITTEE OF WAWA, INC.; JARED G. CULOTTA; MICHAEL J. ECKHARDT; JAMES MOREY; CATHERINE PULOS; HOWARD B. STOECKEL; DOROTHY SWARTZ; RICHARD D. WOOD, JR.; KEVIN WIGGINS; CHRISTOPHER D. WRIGHT,
Defendants-Appellants,

and

WAWA, INC. EMPLOYEE STOCK OWNERSHIP PLAN,
Nominal Defendant.

On Appeal from the United States District Court for the
Eastern District of Pennsylvania

BRIEF OF THE SECRETARY OF LABOR, AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF THE ISSUE

Wawa, Inc. (Wawa) sponsors an employee stock ownership plan (ESOP or Plan), a type of retirement plan covered by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et seq. Former Wawa employees who are Plan participants (the Participants) filed a class-action complaint alleging that the ESOP's fiduciaries (the Fiduciaries) violated ERISA in implementing Plan amendments that, contrary to the Fiduciaries' representations, eliminated the Participants' right to hold Wawa stock through age 68, depriving them of the stock's appreciation and forcing them to sell their shares at an unfair price. Among other claims, the Participants assert the Fiduciaries breached their duties under ERISA section 404, 29 U.S.C. § 1104, by misrepresenting that terminated-employee participants could hold Wawa stock in their ESOP accounts until age 68 and violated ERISA section 102, 29 U.S.C. § 1022, by furnishing materially misleading summary plan descriptions (SPDs). For relief, the Participants seek the equitable remedies of plan reformation and surcharge under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3).

In granting class certification for those claims, the district court held that the Participants need not demonstrate that the class members detrimentally relied on the alleged misrepresentations to prove a violation of section 404 or 102 or to obtain the remedies of plan reformation and surcharge, relying on CIGNA Corp. v. Amara, 563 U.S. 421 (2011), as well subsequent decisions by the Eighth and Second Circuits interpreting Amara. JA11-14 (Order). The Fiduciaries raise four issues on appeal; the Secretary addresses only the second, as stated in the Fiduciaries' brief, at 2-3, as follows:

> Whether the district court erred in concluding that Supreme Court *dictum* regarding ERISA's equitable remedies in CIGNA Corp. v. Amara, 563 U.S. 421 (2011), eliminated the detrimental reliance element required to prove liability for a fiduciary misrepresentation claim under this Court's longstanding precedent.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Secretary of Labor has primary regulatory and enforcement authority for Title I of ERISA. See Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 692-93 (7th Cir. 1986) (en banc). In this case, the Secretary has a substantial interest in ensuring that plan participants and beneficiaries have an adequate equitable remedy when plan fiduciaries breach their fiduciary duty to provide participants with accurate information necessary to make informed decisions about their benefits. See 29 U.S.C. §§ 1022, 1024, 1132, 1135; 29 C.F.R. § 2520.102-3. It is especially important that participants have a remedy where, as here, the breaches alleged are misrepresentations in SPDs, the primary documents sent to participants about plan benefits. See Burstein v. Ret. Account Plan for Emps. of Allegheny Health Educ. and Research Found., 334 F.3d 365, 378 (3d Cir. 2003).

The Secretary files this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

I. Factual Allegations

Wawa's ESOP is an ERISA-covered retirement plan whose primary asset is Wawa stock. JA111, 120 (Compl. ¶¶ 3, 29). The ESOP's fiduciaries are alleged to be Wawa and the Retirement Plans Committee of Wawa (Committee), as well as the individual Committee members and the ESOP Trustees, each of whom is a Wawa officer or director (collectively the Fiduciaries). JA115-20 (Compl. ¶¶ 16-28). Wawa is a closely-held corporation, and one individual defendant and his family are the majority owners. JA121-22 (Compl. ¶ 32). The ESOP owns approximately 41% of Wawa, and its assets are valued at approximately $1.7 billion. JA121 (Compl. ¶ 31).

The Plan formerly permitted all retired and terminated employees with balances of at least $5,000 to continue to hold Wawa stock in the Plan after their employment ended and until they reach age 68, at which time they could receive cash distributions of their benefits in an amount equal to the stock's current value. JA2 (Order). As required by ERISA, see 29 U.S.C. § 1022(a), the Fiduciaries provided SPDs to Plan participants describing the Plan's terms. JA2. Until 2016, these SPDs "stated that terminated employee participants would be 'paid in the same form and manner as retirement benefits,' and that 'no amendment to the Plan will reduce the benefit you have already earned or divest you of any entitlement to a benefit.'" Id. (internal citation omitted). "The SPDs also provided that 'if the total value of your benefit is more than $5,000, you may elect to delay payment until April 1 of the year following the year you reach age 68." Id. (internal citations omitted).

In 2014, Wawa's management began the process of converting the company from a C-Corporation to an S-Corporation, which the management team believed could be "one of the largest value-creating events" in the company's history, worth up to "$1 billion in incremental value to all stakeholders over the next ten years." JA126 (Compl. ¶ 48). Also in 2014, as Wawa was undertaking its conversion, Wawa enacted the first of two amendments to the ESOP intended to remove former employees from the Plan. JA2 (Order). The first amendment (the 2014 Amendment) required the Trustees to liquidate the ESOP stock of any participant who terminated employment *after* January 1, 2015, and stated that all liquidated proceeds would be transferred to participants' 401(k) accounts. Id. Wawa enacted a second amendment (the 2015 Amendment) in August 2015, which required the Trustees to liquidate the ESOP stock of any participant who terminated employment *before* January 1, 2015. JA3 (Order). The ESOP Trustees sent a letter to all terminated employees on August 10, 2015, informing them that Wawa had adopted the 2015 Amendment. Id. The Fiduciaries began implementing the 2015 Amendment on September 11, 2015; terminated participants received $6,940 per share of Wawa stock. Id.

The value of Wawa stock has consistently increased over the last decade; as of December 31, 2010, Wawa stock was valued at $2,766.00 per share. JA136 (Compl. ¶ 86). By June 30, 2015, it was valued at $6,940.00 per share. Id. The stock's value has continued to increase following the passage of the Plan Amendments, and the value as of April 1, 2018, is $10,419.00 per share. Id. (Compl. ¶ 87).

II. Procedural History

The Participants, who separated from Wawa between 2011-2015, were divested of their Wawa stock by the Plan Amendments before they reached age 68. JA3 (Order). They sued the Fiduciaries in August 2018, on behalf of a class of similarly-situated former Wawa employees. JA4. Their complaint asserts ten ERISA claims, including that the Fiduciaries misrepresented the Participants' rights to continue to hold Wawa shares in their retirement accounts until age 68. JA4-5. Specifically:

> Count V alleges that the Fiduciaries breached their fiduciary duties by misrepresenting, in SPDs and other communications, that terminated employee participants could hold Wawa stock in their ESOP accounts until age 68, in violation of ERISA section 404(a)(1)(A), (B), 29 U.S.C. § 1104(a)(1)(A), (B); and
>
> Count VIII alleges that the Committee Defendants violated ERISA by furnishing SPDs that were materially misleading, in violation of ERISA section 102, 29 U.S.C. § 1022.

Id. As relief, the Participants seek reformation of the Plan to conform with the misrepresentations and to surcharge the Fiduciaries for their losses.

On January 10, 2019, the district court largely denied the Fiduciaries' motion to dismiss the complaint, allowing most claims to proceed, including Counts V and VIII. See JA173-74 (Order).

The Fiduciaries challenged class certification as to Counts V and VIII, arguing that the Participants could not satisfy commonality and typicality requirements unless each class member could demonstrate detrimental reliance on the misrepresentations, citing this Court's decisions in In re Unisys Corp. Retiree Med. Benefits ERISA Litig., 579 F.3d 220 (3d Cir. 2009) (Unisys II), and Burstein, 334 F.3d at 365. See JA546-47 (Defs.' Br. Opp. Class Cert.). The Fiduciaries separately argued that the equitable remedies the Participants seek (reformation and surcharge) also require a showing of detrimental reliance. Id. at JA547.

On July 2, 2019, the district court granted the Participants' class certification motion, holding that the Participants need not establish detrimental reliance in order to pursue their misrepresentation claims. JA11-20 (Order). First, the district court acknowledged the Circuit's precedent requiring detrimental reliance in section 404(a) misrepresentation claims like Count V. JA11-12 (citing Burstein, Unisys II, and Shook v. Avaya, Inc., 625 F.3d 69 (3d Cir. 2010)). However, the district court noted that this Court has not addressed the question since the Supreme Court's decision in CIGNA v. Amara. Following a comprehensive analysis, the district court agreed with the Second and Eighth Circuits that Amara made clear that a plaintiff "need not show [section] 404(a) detrimental reliance to seek reformation and surcharge under [section] 502(a)(3)." JA12 (citing Osberg v. Foot Locker, Inc., 862 F.3d 198, 211-12 (2d Cir. 2017), and Silva v. Metro Life Ins., 762 F.3d 711, 722 (8th Cir. 2014)). Second, the district court held that the section 102 misrepresentation claim (Count

VIII) is “analogous” to the misrepresentation claim evaluated by the Supreme Court in Amara and that “detrimental reliance is not necessarily required” to establish a section 102 misrepresentation claim, noting that no contrary Third Circuit precedent on this point exists. JA19 (citing Amara, 563 U.S. at 424, 443-44). Third, the district court held that, per Amara, reliance “is not a prerequisite” for either reformation or surcharge. JA14-15.

On August 13, 2019, the Court granted the Fiduciaries’ petition for permission to appeal the class certification order. JA93-94.

SUMMARY OF ARGUMENT

The district court correctly applied CIGNA v. Amara in holding that participants alleging fiduciary misrepresentations do not need to show detrimental reliance to establish a violation of ERISA sections 102 and 404(a) or to seek reformation and surcharge under section 502(a)(3).

1. In Amara, the Supreme Court rejected the argument that ERISA misrepresentation claims necessarily require a showing of detrimental reliance, and established a two-part framework for analyzing when such a demonstration might be required in order for a participant to obtain equitable remedies under ERISA section 502(a)(3). A court should first determine whether detrimental reliance is necessary to establish a violation of the substantive provision of ERISA at issue. If not, it should determine if reliance is required to obtain the equitable relief sought. The Court held that where, as here, the “relevant substantive provisions” of ERISA do not

"set forth any particular standard for determining harm," Amara, 563 U.S. at 443, "[t]o the extent any such requirement arises, it is because the specific remedy being contemplated imposes such a requirement." Id. The Court then considered and rejected the notion that either reformation or surcharge necessarily required a showing of detrimental reliance. Id. at 442-44. The district court correctly applied Amara in holding, consistent with Osberg and Silva, that the Participants need not show detrimental reliance to establish their ERISA sections 102 and 404(a) misrepresentation claims or to seek reformation and surcharge under section 502(a)(3).

2. On appeal, the Fiduciaries argue that the Court should impose a detrimental reliance requirement on the misrepresentation claims here, notwithstanding Amara, for three reasons. First, they contend that Amara is distinguishable. Second, they characterize Amara's rationale as dictum and urge the Court instead to follow pre-Amara precedent requiring detrimental reliance in section 404(a) misrepresentation claims. Third, they suggest that a detrimental reliance requirement finds support in ERISA's statutory scheme and goals. These arguments fail.

The first assertion, that Amara is distinguishable, cannot withstand scrutiny. Amara's framework squarely addresses when detrimental reliance is required in an ERISA fiduciary misrepresentation case, and as the Second Circuit recently held, that framework "mandates the conclusion that detrimental reliance need not be shown" in section 404(a) cases like this one. Osberg, 862 F.3d at 212 (internal citation omitted).

The second argument, that the Court should treat Amara as dictum, and ignore its rationale in favor of contrary pre-Amara Circuit precedent, also fails. Amara's standard of harm discussion was not dictum; it followed from the question upon which the Court granted certiorari, and was pivotal to the Court's remand instruction and the case's ultimate resolution. Other courts of appeals have followed Amara consistent with the district court's decision. Accordingly, Amara controls, not this Court's prior precedent requiring detrimental reliance. Further, a reevaluation of this Court's precedent requiring detrimental reliance is warranted in light of the evolution of the panel decisions on this point; the Court previously utilized a less stringent "resulting harm" standard that is in tension with the "detrimental reliance" standard used in the Court's later cases, but in accord with Amara.

Finally, the third argument, that a detrimental reliance requirement finds support in ERISA's statutory scheme and goals, fares no better. To the contrary, a detrimental reliance requirement is inconsistent with ERISA's text and purposes.

ARGUMENT

I. Under Amara, Plaintiffs Alleging Fiduciary Misrepresentations In Violation Of ERISA Sections 102 And 404(a) Need Not Demonstrate Detrimental Reliance In Order To Obtain Reformation Or Surcharge

The Supreme Court's decision in CIGNA v. Amara dispositively resolves the question presented. The Participants do not need to demonstrate detrimental reliance to bring their misrepresentation claims or to obtain reformation or surcharge.

In Amara, defendant CIGNA converted its defined-benefit pension plan to another type of pension plan, a cash balance plan, but misrepresented in the plan's SPDs and in other communications that the participants would continue to accrue benefits after the conversion, when in fact many participants temporarily stopped accruing benefits. 563 U.S. at 424. The district court in Amara held that CIGNA violated ERISA's disclosure requirements in sections 102(a), 104(b), and 204(h) through its misrepresentations, and ordered that the plan be reformed to accord with its representations, pursuant to ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Id. at 424-25. The Supreme Court granted certiorari to address the question of whether a showing of "likely harm," as opposed to detrimental reliance, was "sufficient to entitle plan participants to recover benefits based on faulty disclosures." Id. at 435.

The Court first addressed whether ERISA section 502(a)(1)(B), the provision authorizing claims to enforce plan terms, sanctions a reformation of the plan to accord with contrary terms in an SPD. Amara, 563 U.S. at 435. Section 502(a)(1)(B) authorizes a civil action by a participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). The Court held that the relief awarded by the lower court was unavailable under section 502(a)(1)(B), because that provision's text "speaks of *'enforc[ing]'* the terms of the plan,' not of *'changing'* them," and altering the plan to conform to the terms expressed in the SPD, "seems less like the simple enforcement of a contract as written and more like an equitable remedy." Amara, 563 U.S. at 436 (quoting 29 U.S.C. § 1132(a)(1)(B)). However, the Court explained that the district court could provide such relief under ERISA section 502(a)(3), which allows participants "to obtain other appropriate equitable relief" to redress ERISA violations, noting that the relief entered by the lower court "closely resembles three [] traditional equitable remedies": reformation, estoppel, and surcharge. Id. at 440-41.

The Court then considered, in the context of those three potential equitable remedies, "the parties' dispute as to the appropriate legal standard in determining whether members of the relevant employee class were injured." Amara, 563 U.S. at 442-43. CIGNA argued, as the Fiduciaries do here, that ERISA misrepresentation claims require a showing of detrimental reliance as sufficient harm in order to gain relief. See Brief for Petitioners, CIGNA v. Amara, 2010 WL 3410900, at *24-41. As the Second Circuit summarized, Amara established a two-part inquiry to determine "the applicable standard of harm," for an ERISA misrepresentation claim: "(1) whether the substantive ERISA provision in question sets forth a standard for determining harm; and (2) whether the specific remedy being contemplated imposes such a requirement." Osberg, 862 F.3d at 212 (citing Amara, 563 U.S. at 443).

On the first step, the Court reviewed the relevant statutory provisions before it, ERISA sections 102(a), 104(b), and 204(h), and concluded that those "substantive provisions of ERISA do not set forth any particular standard for determining harm." Amara, 563 U.S. at 443. Accordingly, "any requirement of harm must come from the law of equity." Id. Moving to the second step, the Court noted that while the equity courts insisted upon a showing of detrimental reliance in cases where they employed the remedy of equitable estoppel, no such requirement exists in section 502(a)(3) or the two remedies at issue in this case: reformation and surcharge. Id. at 443-44 (internal citations omitted).

Thus, the Supreme Court already considered and rejected the Fiduciaries' detrimental reliance argument, and consistent with the Second Circuit's decision in Osberg and the Eighth Circuit's decision in Silva, the district court correctly applied Amara in holding that the Participants need not demonstrate detrimental reliance in order to bring their misrepresentation claims or to obtain reformation or surcharge under ERISA section 502(a)(3). JA11-20 (Order).

II. The Fiduciaries' Arguments Are Unsupportable

The Fiduciaries unsuccessfully attempt to escape the consequences of Amara in three alternative ways. First, they assert that Amara is distinguishable. Second, they contend that Amara's rationale can be disregarded as dictum. Third, they essentially argue that Amara was wrongly decided in light of ERISA's statutory scheme. Each argument is meritless.

A. Amara's Rationale Applies With Equal Force To Section 404(a) Claims

The Fiduciaries suggest Amara is distinguishable because it did not address whether detrimental reliance is a necessary element of an ERISA misrepresentation claim, and to the extent it did, Amara is nevertheless distinguishable because it did not specifically "involve a fiduciary misrepresentation claim under ERISA § 404, 29 U.S.C. §1104." Appellants' Br. at 29. To the contrary, Amara clearly articulated a framework for determining whether a showing of detrimental reliance is required in an ERISA case, under which the determination does not turn on whether the substantive ERISA provision violated is section 102 or section 404, but on whether the *remedy sought* requires it. Further, Amara also made clear that the remedies the Participants seek here do not require detrimental reliance. Amara, 563 U.S. at 442-444.

While Amara did not address specifically a section 404(a) misrepresentation claim, it did address a misrepresentation claim (brought under section 102), and its reasoning applies with equal force to section 404(a) claims. Indeed, as the Second Circuit recently noted, application of Amara's reasoning "mandates the conclusion that detrimental reliance need not be shown where, as here, a plaintiff alleging a violation of § 404(a) seeks plan reformation under § 502(a)(3)." Osberg, 862 F.3d at 211-12 (emphasis added). The Eighth Circuit adopted a similar view. See Silva, 762 F.3d at 722 (Amara "changed the legal landscape" and detrimental reliance need not be demonstrated to obtain surcharge post-Amara). As with Amara, Osberg, and Silva, the misrepresentation claims at issue here, brought under sections 102 and 404(a), allege that the Fiduciaries put forward misleading communications about material plan benefits. Because the statutory text of sections 102 and 404(a) "does not articulate any standard for determining harm, any requirement of detrimental reliance in this case must arise because of the 'specific remedy being contemplated.'" Osberg, 862 F.3d at 212 (citing 29 U.S.C. § 1104(a) and quoting Amara, 563 U.S. at 443). And as described above, Amara makes clear that the two remedies at issue in this case – reformation and surcharge – do not insist upon a showing of detrimental reliance.[1]

[1] On appeal, the Fiduciaries abandoned their argument that reformation and surcharge require a showing of detrimental reliance. See Appellants' Br. at 31-34. They nonetheless argue that "Counts V and VIII require proof of detrimental reliance," based on their assertion that the Participants supposedly seek "a remedy *equivalent* to equitable estoppel." Id. at 35 (emphasis added). The Secretary disagrees that the remedy of equitable estoppel should be the primary or only remedy for misrepresentation claims. Amara itself contemplated other remedies for misrepresentation claims, Amara, 563 U.S. at 438-42, as has this Court. Unisys I, 57

In sum, the Fiduciaries' fundamental premise, that "Amara did not address the elements necessary to establish a violation of ERISA," Appellants' Br. at 29, is wrong. Amara did address this question, and, as the Second Circuit held, its reasoning "*mandates* the conclusion that detrimental reliance need not be shown" to establish a claim under section 404.[2] Osberg, 862 F.3d at 212 (emphasis added); see also Silva, 762 F.3d at 722. By making no attempt to refute Osberg's or Silva's analysis, and relying instead solely on pre-Amara cases to support their interpretation of Amara, Appellants Br. at 30-31 (citing Unisys II and Pell v. E.I. DuPont de Nemours & Co., 539 F.3d 292 (3d Cir. 2008)), the Fiduciaries undermine their position.

F.3d at 1269. The Secretary, however, takes no position on whether the remedies of reformation or surcharge are appropriate for the facts in this case.

[2] Amara addressed a section 102 misrepresentation claim; nonetheless the Fiduciaries also make a cursory argument that a showing of detrimental reliance is necessary for claims under ERISA section 102, essentially arguing that Amara was wrongly decided. See Appellants' Br. at 26-27. However, the Fiduciaries' sole authority for this proposition, Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310, 1318-19 (3d Cir. 1991), held no such thing. Gridley merely held that reliance was a necessary element under "the doctrine of equitable estoppel," which was the only "equitable doctrine" that the plaintiff in Gridley pursued. See id. at 1318-19. As the district court observed, "the Third Circuit has never held that [sections] 102 and 104 misrepresentation claims require a showing of detrimental reliance." JA19.

B. Amara's Rationale Is Not Dictum And Prior Circuit Precedent Should Be Revisited Even If It Is Dictum

Alternatively, the Fiduciaries characterize Amara's rationale as dictum and urge the Court to follow its pre-Amara precedent requiring detrimental reliance. See Appellants' Br. at 26-31 (citing Unisys II, 579 F.3d at 228-29, Hooven v. Exxon Mobil Corp., 465 F.3d 566, 571 (3d Cir. 2006), and Curcio v. John Hancock Mut. Life Ins., 33 F.3d 226, 235 (3d Cir. 1994));[3] JA50-51(Defs' 23(f) Pet.). The Fiduciaries' effort to marginalize this portion of Amara as dictum fails. Further, even if Amara's rationale is dictum, the Secretary urges the Court to revisit its precedent requiring detrimental reliance in light of Amara, see, e.g., United States v. Schonewolf, 905 F.3d 683, 690 n.40 (3d Cir. 2018) (intervening Supreme Court case law allows for the reevaluation of a published decision of a prior panel), as well as the Third Circuit's earlier precedent employing a less stringent "resulting harm" standard, see Unisys I, 57 F.3d at 265.

1. Amara's reasoning regarding when detrimental reliance is required in order to pursue an ERISA misrepresentation claim is not dictum. Language from a judicial opinion may be "technically categorized as dictum" where it does "not decide the precise issue before the court." Cerro Metal Prod. v. Marshall, 620 F.2d

[3] As with Gridley, see supra n.2, the Fiduciaries misconstrue Curcio's holding by conflating the elements of an equitable estoppel remedy with those of a substantive ERISA violation. See Curcio, 33 F.3d at 235.

964, 978 (3d Cir. 1980). But, in Amara, the Court granted certiorari to address *this very issue*: whether a showing of "likely harm," as opposed to detrimental reliance, was "sufficient to entitle plan participants to recover benefits based on faulty disclosures." 563 U.S. at 435. CIGNA argued there, like the Fiduciaries here, that detrimental reliance is required for all ERISA misrepresentation claims, relying on the same Third Circuit authority. Brief for Petitioners, CIGNA v. Amara, 2010 WL 3410900 at *23 ("Under ordinary principles of equity, an action for redress of a misrepresentation under ERISA § 502(a)(3) - whether framed as breach of fiduciary duty or equitable estoppel - requires a showing of detrimental reliance.") (citing Hooven, 465 F.3d at 571). The Court rejected this argument and resolved "the parties' dispute as to the appropriate legal standard in determining whether members of the relevant employee class were injured" by misrepresentations, Amara, 563 U.S. at 442-43, concluding that plaintiffs may obtain certain equitable relief for fiduciary misrepresentations without a showing of detrimental reliance. The district court relied on this part of Amara to conclude that detrimental reliance was not required for surcharge or reformation. JA11-14 (Order) (citing Amara, 563 U.S. at 443-44).

Moreover, the conclusions that the Secretary derives from Amara for this case necessarily flow from Amara's holding. Amara remanded the case for adjudication under section 502(a)(3), reciting the long-standing principle that section 502(a)(3) remedies are derived from the law of trusts. The Fiduciaries do not dispute that misrepresentations can be remedied through section 502(a)(3), that section 502(a)(3) relies on trust law, or that Amara's discussion of that trust law is accurate. Indeed, this Court, in an unpublished opinion, said that in Amara, the Supreme Court "*held* that a showing of 'detrimental reliance' is not necessary for all forms of equitable relief under § 502(a)(3)" and "'[i]nformation-related circumstances, violations, and injuries are potentially too various in nature to insist that harm must always meet that more vigorous 'detrimental harm' standard when equity imposed no such strict requirement.'" Engers v. AT & T, Inc., 466 F. App'x 75, 81 n.9 (3d Cir. 2011) (unpublished) (emphasis added) (quoting Amara, 563 U.S. at 445).[4]

2. Even assuming that Amara's conclusions are dictum, this Court has held that it "should not idly ignore considered statements the Supreme Court makes in dicta." In re McDonald, 205 F.3d 606, 612 (3d Cir. 2000). "To ignore what we perceive as persuasive statements by the Supreme Court is to place our rulings, and the analysis that underlays them, in peril." Galli v. N.J. Meadowlands Comm'n, 490 F.3d 265, 274 (3d Cir. 2007).[5]

[4] The Fiduciaries suggest this Court has already rejected Amara's application to section 404(a) cases, citing Roarty v. Tyco Int'l Ltd. Grp. Bus. Travel Accident Ins. Plan, 546 F. App'x 85 (3d Cir. 2013) (unpublished). See Appellants' Br. at 28-29. While Roarty affirmed a district court decision citing the Third Circuit's pre-Amara precedent, it does not mention Amara, nor explain how the detrimental harm requirement can be viable in light of Amara. Moreover, the Fiduciaries do not address Engers, which specifically interprets Amara.

[5] A concurring opinion in Amara suggested some aspects of the majority's decision was dictum, but the concurrence did not reach any definitive conclusions on remedies, merely suggesting that the lower courts decide the scope of equitable

Accordingly, six other Circuits have followed Amara whether they considered it controlling or assumed it was dictum. Compare Osberg, 862 F.3d at 211-12 (rejecting pre-Amara precedent in holding that Amara's reasoning "mandates the conclusion that detrimental reliance need not be shown where, as here, a plaintiff alleging a violation of § 404(a) seeks plan reformation under §502(a)(3)"), and Moyle v. Liberty Mut. Ret. Ben. Plan, 823 F.3d 948, 960 (9th Cir. 2016) (Amara is "controlling authority" on the question of equitable remedies available under section 502(a)(3)), and Pearce v. Chrysler Grp., L.L.C. Pension Plan, 615 F. App'x 342, 349 (6th Cir. 2015) (relying on Amara in holding that a "material conflict between the Pension Plan and the SPD permits Pearce to seek equitable relief under ERISA § 502(a)(3)"), and Silva, 762 F.3d at 721-23 (noting that Amara "changed the legal landscape" and holding that, post-Amara, detrimental reliance need not be demonstrated to obtain surcharge), with Gearlds v. Entergy Services, Inc., 709 F.3d 448, 452 (5th Cir. 2013) ("[e]ven assuming it is *dictum*, however, we give serious consideration to this recent and detailed discussion of the law by a majority of the Supreme Court"), and McCravy v. Metro. Life Ins. Co., 690 F.3d 176, 182 (4th Cir. 2012) ("[e]ven assuming for the sake of argument that [Amara] is [dictum], we cannot simply override a legal pronouncement endorsed just last year by a majority

remedies in the first instance and in light of Amara, which they generally have. See Amara, 563 U.S. at 449-51 & n.3 (Scalia & Thomas, JJ., concurring in judgment).

of the Supreme Court"); see generally Menkes v. Prudential Ins. Co. of Am., 762 F.3d 285, 296 n.11 (3d Cir. 2014) (citing Amara and McCravy).

3. If this court does not consider Amara to be controlling, it should consider the evolution of its own panel decisions regarding the standard of harm necessary to state a misrepresentation claim under ERISA section 404(a). While this Court has required detrimental reliance in its more recent cases, it previously utilized a less stringent "resulting harm" standard (akin to the "actual harm" standard later articulated in Amara), and has never explained the reason for the change. See Unisys II, 579 F.3d at 229 ("although we have at times described the fourth element as 'resulting harm' to the plaintiff, [] we have since clarified that this element requires a showing of detrimental reliance by the plaintiff") (citing Unisys I, 57 F.3d at 1265, and Hooven, 465 F.3d at 571); JA13 (Order) ("Nor has the Third Circuit ever explained the reason for the detrimental reliance requirement on [section] 404 claims"). Consideration of this evolution, especially in light of the Supreme Court's intervening decision in Amara, weighs in favor of revisiting the Court's detrimental reliance requirement.

In Unisys I, the "landmark case in this area," Adams v. Freedom Forge Corp., 204 F.3d 475, 492 (3d Cir. 2000), this Court utilized the less stringent "resulting harm" standard in evaluating a section 404(a) misrepresentation claim, see Unisys I, 57 F.3d at 1265. In that case, retirees' welfare benefits were terminated by their employer, notwithstanding the employer's representations that the benefits would continue for the retirees' lifetimes. Id. at 1258-60. The plaintiffs alleged that these fiduciary misrepresentations violated ERISA section 404(a) and sought equitable relief, in the form of post-retirement medical benefits, under section 502(a)(3). Id. at 1257. Recounting its prior misrepresentation decisions, this Court emphasized that a fiduciary carrying out its statutory obligations under section 404(a) "may not materially mislead those to whom the duties of loyalty and prudence are owed," id. at 1261, and concisely summarized the four elements of a fiduciary breach misrepresentation claim: "proof of fiduciary status, misrepresentations, company knowledge of the confusion and *resulting harm to the employees*." Id. at 1265 (emphasis added). Notably, those requirements did not include a showing of detrimental reliance, only "resulting harm."

To the extent those older cases discussed the detrimental effect of the misrepresentations, the focus was on whether the fiduciary should have anticipated that its misrepresentations might cause harm, rather than imposing a requirement that the employees demonstrate reliance. See, e.g., Kurz v. Phila. Elec. Co., 994 F.2d 136, 140 (3d Cir. 1993) ("the ultimate inquiry is whether there is a 'substantial likelihood' that the affirmative misrepresentation 'would mislead a reasonable employee in making an adequately informed decision'") (quoting Fischer v. Phila. Elec. Co., 994 F.2d 130, 135–36 (3d Cir. 1993)); see also Unisys I, 57 F.3d at 1264 (materiality of misrepresentation should be judged by whether "there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed retirement decision.").[6]

Five years after Unisys I, this Court considered a similar ERISA misrepresentation claim in Adams, but in the context of a challenge to a district court's grant of a preliminary injunction. Because the facts of the case were "so much like those in Unisys [I], the landmark case in this area," the Court found it "need spend but little time" addressing the likelihood of success on the merits prong of the preliminary injunction standard. Id. at 492. The Court then seemingly restated its previous "resulting harm" standard in terms of detrimental reliance, reciting the four elements of a misrepresentation claim, as follows:

> An employee may recover for a breach of fiduciary duty if he or she proves that an employer, acting as a fiduciary, made a material misrepresentation that would confuse a reasonable beneficiary about his or her benefits, and the beneficiary acted thereupon to his or her detriment.

Id. (citing Unisys I 57 F.3d at 1264). It is unclear whether the Court in Adams actually meant to put forward a new standard, or rather, in the context of a preliminary injunction ruling, state that detrimental reliance was one way in which a plaintiff could demonstrate "resulting harm." Regardless, Adams' sole justification

[6] See also Unisys I, 57 F.3d at 1264 ("[o]ur decisions in Bixler, Fischer, Curcio and Smith firmly establish that when a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries.")

for this harm standard was Unisys I, which, as described above, spoke in terms of "resulting harm," not "detrimental reliance." And subsequent Third Circuit decisions repeated the detrimental reliance requirement based in large part on the brief discussion in Adams. See, e.g., Burstein, 334 F.3d at 387 (citing Adams and cases following it for proposition that detrimental reliance is a necessary element for these claims). Thus, contrary to the Fiduciaries' assertion that the Third Circuit has "long held that proof of detrimental reliance is required" for these sorts of claims, Appellants' Br. at 26, the requirement has been imposed only in the Circuit's newer cases, and it is only on these more recent cases that the Fiduciaries rely.

In Burstein this Court did not dispute the point that Unisys I required only "resulting harm" but cited Adams to support detrimental reliance. Since Burstein, the Supreme Court in Amara has clarified that although detrimental reliance may establish harm, it is not the only way to do so. Amara, 563 U.S. at 444 ("while "actual harm may sometimes consist of detrimental reliance, [] it might also come from the loss of a right protected by ERISA or its trust-law antecedents"). Amara's holding and the Third Circuit's earlier cases are in accord. The Third Circuit's newer cases that require detrimental reliance (or equate detrimental reliance with harm) are in tension, if not in conflict, with its older cases, which this Court generally treats as the controlling authority. Cf. United States v. Tann, 577 F.3d 533, 541 (3d Cir. 2009) ("[i]n the unique circumstance when our panel decisions conflict and our Court has not spoken en banc, however, the earlier decision is generally the controlling authority.”). Ultimately, Amara spoke clearly, and the Third Circuit’s newer cases are no longer good law post-Amara; they also provide no basis or reasoning to require detrimental reliance under ERISA or the law of trusts.

C. Imposing A Detrimental Reliance Requirement On Misrepresentation Claims Arising Under Section 404(a) Is Inconsistent With ERISA’s Text And Purposes

The Fiduciaries’ final argument essentially is that Amara was wrongly decided, and that a detrimental reliance requirement would serve ERISA’s policy goals. See Appellants’ Br. at 27 (arguing that even if their desired detrimental reliance requirement has no grounding in ERISA’s “statutory language,” it nonetheless “follows from the policies of the federal statutory scheme in question . . . when plan participants seek to enforce rights inconsistent with an ERISA plan’s terms.”). This assertion is at odds with ERISA’s text and purposes.

The Fiduciaries’ argument is built from a series of selective quotes from Amara’s discussion about whether an SPD’s terms can be enforced under section 502(a)(1)(B). See Appellants’ Br. at 27-28. The Fiduciaries note the Court’s conclusion that an SPD is distinct from the “plan” (and thus cannot be enforced under section 502(a)(1)(B)), and then suggest, erroneously, that this means that a fiduciary cannot be held accountable for misrepresentations in an SPD absent a showing of detrimental reliance. Id. This contention ignores the “gravamen” of

Amara, JA 14 (Order), which, as described above, held the exact opposite.[7] See supra Section I. The argument is particularly problematic because ERISA "contemplates that [an SPD] will be an employee's primary source of information regarding employee benefits." Burstein, 334 F.3d at 378 (emphasis and citation omitted). A detrimental reliance requirement vitiates this statutory scheme by undermining enforcement mechanisms that are designed to hold fiduciaries accountable for misrepresentations without regard to whether participants can demonstrate detrimental reliance.

Additionally, a fiduciary misrepresentation about benefits to participants in SPDs and other communications is a violation of section 404(a)'s duty of loyalty. See Varity v. Howe, 516 U.S. 489, 506 (1996) ("Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA."). ERISA's protections, including its fiduciary standards and mandatory disclosures, "are given effect by section 502(a)(3) which, in the language of the statute, authorizes the award of 'appropriate equitable relief' directly to a participant or

[7] The Fiduciaries cite a number of decisions on this point, Appellants' Br. at 27-28, though only Guerra-Delgado v. Popular, Inc., 774 F.3d 776 (1st Cir. 2014), and Skinner v. Northrop Grumman Ret. Plan B, 673 F.3d 1162 (9th Cir. 2012), post-date Amara, and neither supports the argument that a misrepresentation claim requires evidence of detrimental reliance. Instead, both cases discuss the necessity of showing detrimental reliance in the context of the particular *remedies* and facts at issue in those cases, but not here. See Guerra-Delgado, 774 F.3d at 782-83; Skinner, 673 F.3d at 1166-67.

beneficiary to redress any act or practice which violates the provisions of ERISA." Bixler v. Cent. Pennsylvania Teamster Health & Wealth Fund, 12 F.3d 1292, 1299 (3d Cir. 1983) (emphasis removed). Adding an atextual detrimental reliance requirement would leave plan participants harmed by significant ERISA violations without a remedy.[8] Just because a plaintiff cannot demonstrate that she relied to her detriment upon a particular misleading statement does not mean that she was not harmed. As the Supreme Court cautioned, "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." Amara, 563 U.S. at 444. This is "actual harm" caused by a violation, and it is "doubt[ful] that Congress would have wanted to bar those employees from relief." Id.

[8] As noted earlier, section 404(a) does not include a detrimental reliance requirement. The absence of the requirement is meaningful, because ERISA provides for the enforcement of its stringent fiduciary duties and other requirements through an "interlocking, interrelated, and interdependent remedial scheme." Massachusetts Mut. Ins. Co. v. Russell, 473 U.S. 134, 146 (1985). "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because prudence dictates." Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 (2014).

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court affirm the district court’s holding that a plaintiff need not demonstrate detrimental reliance to brings claims for fiduciary misrepresentations under ERISA sections 102 and 404(a) to obtain reformation or surcharge under section 502(a)(3).

DATED: December 11, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with FED. R. APP. P. 29(a)(5), FED. R. APP. P. 32(a)(5) and FED. R. APP. P. 32(a)(6), because it has been prepared in proportionately spaced typeface using Microsoft Word in 14-point Times New Roman, and excluding the parts of the document exempted by FED. R. APP. P. 32(f), it contains 6,477 words. In accordance with Local Appellate Rule 31.1(c), I further certify that the digital version and hard copies of the document are identical, that a virus scan was performed on the document using McAfee, and that no viruses were detected.

DATED: December 11, 2019

/s/ Michael N. Khalil
MICHAEL KHALIL

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF System.

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