

No. 09-804

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IN THE  
SUPREME COURT OF THE UNITED STATES

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CIGNA CORPORATION and CIGNA PENSION PLAN,  
*Petitioners,*

v.

JANICE C. AMARA, GISELA R. BRODERICK, ANNETTE S.  
GLANZ, Individually and on Behalf of All Others  
Similarly Situated,  
*Respondents.*

\_\_\_\_\_

On Writ Of Certiorari To  
The United States Court Of Appeals  
For The Second Circuit

\_\_\_\_\_

**BRIEF *AMICUS CURIAE* OF AARP  
IN SUPPORT OF RESPONDENTS**

\_\_\_\_\_

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT .....	4
I.    CONGRESS ENACTED ERISA TO PROTECT PROMISES OF PENSION BENEFITS SO EMPLOYEES COULD PLAN FOR THEIR RETIREMENT.....	4
A.    Retirement Benefits Are A Critical Element of An Employee’s Compensation Package .....	4
B.    Inaccurate Or Misleading Information Concerning Employee Benefits Skews The Employment Relationship To Favor Employers.....	6

C.	Congress Enacted ERISA To Protect Participants And Used Accurate Disclosure As One Of The Mechanisms To Do So.....	7
D.	Congress Intended That ERISA's Disclosure And Notice Requirements Inform Employees Of The Benefits They Should Expect – Or Not Expect – From A Plan .....	10
II.	IN RESOLVING A CONFLICT BETWEEN THE FORMAL PLAN DOCUMENT AND THE SUMMARY PLAN DESCRIPTION, THE USE OF A DETRIMENTAL RELIANCE STANDARD IS INCONSISTENT WITH ERISA'S PURPOSES AND TERMS .....	14
	CONCLUSION.....	19

## TABLE OF AUTHORITIES

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<i>Cent. Laborers' Pension Fund v. Heinz</i> , 541 U.S. 739 (2004) .....	4
<i>Hardt v. Reliance Std. Life Ins. Co.</i> , 130 S. Ct. 2149 (2010) .....	3, 14
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<i>Young v. Verizon's Bell Atl. Cash Balance Plan</i> , 2010 U.S. App. LEXIS 16483 (7 <sup>th</sup> Cir. 2010) .....	17, 18

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**INTEREST OF *AMICUS CURIAE***<sup>1</sup>

AARP is a non-partisan, non-profit organization dedicated to representing the needs and interests of people age fifty and older. Nearly half of AARP's members are employed full or part-time, with many working for employers which provide health, pension and disability benefit plans covered by the Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1001 *et seq.*

Participants and beneficiaries<sup>2</sup> in private, employer-sponsored employee benefit plans rely on ERISA to protect their rights under those plans. 29 U.S.C. § 1001 *et seq.* In particular, ERISA's protections, and the ability to enforce these protections, are of vital concern to older workers and retirees, since the quality of their lives in retirement depends heavily on their eligibility for and the amount of their pension and welfare benefits.

Thus, resolution of the issues in this case will have a significant impact on the integrity of the

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<sup>1</sup> In compliance with Rule 37 of this Court, counsel for AARP states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. The parties have consented to the filing of this brief.

<sup>2</sup> AARP's use of the term "participants" throughout this brief also includes the term "beneficiaries."

administration of employee benefit plans, individual participants' abilities to obtain accurate information to make informed decisions concerning their employment and benefits, and their ability to obtain their retirement benefits which will foster their economic security. In light of the significance of the issues presented by this case, AARP respectfully submits this brief *amicus curiae* to facilitate a full consideration by the Court of these issues.

### SUMMARY OF ARGUMENT

Because company benefit packages including pensions are a critical component of the employment relationship, *see* MetLife, *Eighth Annual Study of Employee Benefits Trends: Findings from the National Survey of Employers and Employees* at 8, 18 (2010) (hereinafter *Eighth Annual Study*), affirmative misrepresentations or knowing omissions about those benefits puts employees in a disadvantageous position because they may overvalue their benefits, accept lower compensation, or stay with that employer longer. Teresa Ghilarducci, *Pensions & The Uses of Ignorance by Unions and Firms*, 11(2) J. LAB. RES. 203, 204, 206 (Spring 1990). In enacting ERISA, Congress sought to hold employers accountable for the benefit they promised employees by requiring accurate, understandable, and timely disclosures. *See Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 374-75 (1980); ERISA § 2, 29 U.S.C. § 1001. If pension disclosures are accurate and understandable, whether participants specifically read them or learned about them by another

method,<sup>3</sup> participants can make informed decisions concerning their benefits and employment, ranging from protesting, looking for new employment, or saving more. *E.g.*, Richard A. Oppel, Jr., *Companies Cash In on New Pension Plan; But Older Workers Can Face Penalties*, N.Y. TIMES, Aug. 20, 1999.

ERISA's statutory language neither creates nor compels a subjective reliance or prejudice standard in its disclosure requirements, *see* ERISA §§ 101-104, 29 U.S.C. §§ 1021-1024, and one should not be inferred from the statute's clear language. *See Hardt v. Reliance Std. Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010). If plans have no incentive to provide accurate and understandable summary plan descriptions, many participants will have trouble understanding them and remembering their provisions. *See* U.S. Dep't of Labor, Employee Benefits Security Administration, ERISA Advisory Council, *Report of the Working Group on Communications to Retirement Plan Participants* (Nov. 2005) (hereinafter *Report of the Working Group*). A detrimental reliance or prejudice standard which requires reading, understanding, and recollection will be impossible for most participants to prove and is inconsistent with Congress' carefully crafted disclosure scheme.

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<sup>3</sup> *See* Sewin Chan & Ann Huff Stevens, *What You Don't Know Can't Help You: Pension Knowledge and Retirement Decision Making*, 90(2) THE REV. ECON. & STAT. 253, 260-61 (May 2008).

## ARGUMENT

### I. CONGRESS ENACTED ERISA TO PROTECT PROMISES OF PENSION BENEFITS SO EMPLOYEES COULD PLAN FOR THEIR RETIREMENT.

More than a decade after this Court decided that improper disclosures in an employee benefit plan could give rise to a breach of fiduciary duty claim, *Varity Corp. v. Howe*, 516 U.S. 489 (1996), and more than five years after this Court recognized a change in plan provisions could not affect pension benefits that were already earned, *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004), the Court is called upon to determine, yet again, the relationship between changes in plan provisions, improper disclosures about those changes, and the impact on employees' benefits.

#### A. Retirement Benefits Are A Critical Element of An Employee's Compensation Package.

A simple equation exists in the workplace: an employer is able to operate its business with the benefit of an employee's labor in exchange for paying that employee a salary and other benefits. *See generally* Anne Marie Lofaso, *Toward A Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1 (Fall 2007). The benefits exchanged for the employee's labor often may include pension and other employee benefits. *See* Employee Retirement

Income Security Act, Pub. L. No. 93-406, *reprinted in* SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 94<sup>th</sup> CONG., Legislative History of the Employee Retirement Income Security Act of 1974, at 4751 (1976).

Company benefit packages are important to employees and employers. Pension benefits play an important role in an employer's ability to recruit, retain, and maintain productivity in a high quality workforce. *See* MetLife, *Eighth Annual Study* at 8, 18; Society for Human Resource Management, *2009 Employee Benefits: Examining Employee Benefits in a Fiscally Challenging Economy* at 8, 19-20, 23-242 (June 2009), <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/2009EmployeeBenefitsSurveyReport.aspx> (concluding that “[e]mployees consistently rate benefits as one of the key factors in employee job satisfaction. It is important for an employee benefits package to be attractive to both current and prospective employees . . .”). Moreover, more than three-quarters of employees surveyed believed that retirement benefits were important factors to generate employee loyalty. MetLife, *Eighth Annual Study* at 19. As the demographics of this country change, employees are focusing more on retirement issues. Consequently, in return for offering pension benefits, the employer obtains lower employee turnover, which reduces costs and improves productivity. *Id.* at 8.



**B. Inaccurate Or Misleading Information Concerning Employee Benefits Skews The Employment Relationship To Favor Employers.**

Inequalities in information between an employer and its employees, such as the imbalance that CIGNA created by affirmatively misrepresenting the losses from wear-away to its employees, are valuable to the employer because employees will only later learn they will not receive the benefits they expected. Meanwhile, employees will remain with their employer, thereby minimizing the employer's recruiting and training costs, and the employer's reputation will not be harmed. *See* David Charny, *The Employee Welfare State in Transition*, 74 TEX. L. REV. 1601, 1618 (1996); Marlene O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C.L. REV. 1189, 1208 (June 1991); *see generally* Lofaso, at 9 (firms attempt to maximize profits); Russell Korobkin & Thomas Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CAL. L. REV. 1051, 1064 (July 2000) (individuals must have complete and accurate information in order to make true comparisons and maximize their wealth).

When employees are told they have a "good" pension plan and losses or other restrictions are undisclosed, employees overvalue their benefits, accept lower compensation packages, or stay longer with that employer. Ghilarducci, at 203-04, 206; *see*

*also* Korobkin & Ulen, at 1054 (“people respond to incentives”). Ignorance of the plan’s rules among less influential or knowledgeable employees can also permit employers to redistribute benefits to more valued or influential employees without significant resistance, such as occurred here with CIGNA’s grandfathering of certain employees including the CEO and other executives under the prior plan. *See* Andrew A. Luchak and Morley Gunderson, *What Do Employees Know About Their Pension Plan?*, 39(4) INDUS. REL. 650, 651, 664-65 (Oct. 2000). By failing to accurately disclose the cash balance plan changes in its summary plan descriptions and summary of material modifications, CIGNA employees were left with the perception that the amount of their retirement benefits would be higher than they actually were. As a corollary, CIGNA was able to gain something valuable without assuming additional costs that would hurt its bottom line.

**C. Congress Enacted ERISA To Protect Participants And Used Accurate Disclosure As One Of The Mechanisms To Do So.**

After assembling a record that showed a history and pattern of employees failing to receive their promised employee benefits, a lack of disclosure and transparency, and varied and numerous financial abuses, Congress enacted ERISA, declaring that in its judgment “the interests of participants in employee benefit plans and their beneficiaries” should be protected. Congress concluded that among the safeguards which would

lead to the protection of employee benefits was “the disclosure and reporting to participants and beneficiaries of financial and other information . . . .,” by requiring “disclosures be made and safeguards be provided with respect to the establishment, operation, and administration of such plans,” and “by establishing standards of conduct, responsibility, and obligation of fiduciaries of employee benefit plans.” ERISA § 2, 29 U.S.C. § 1001; *see also* Legislative History of the Employee Retirement Income Security Act of 1974, Vol. III, at 4668 (stating that the “availability of this information will enable both participants and the Federal Government to monitor the plans’ operations”).<sup>4</sup> This language in ERISA’s legislative declaration demonstrates Congress’ obvious and unremarkable intent that ERISA would make it easier, not more difficult, for participants to obtain their benefits.

One of Congress’ primary focuses in enacting ERISA was to hold employers accountable for the benefits they promise to their employees to ensure that employees can safely rely on such promises in their retirement planning. This type of accountability is central to ERISA’s primary goal of protecting employees’ benefits. *See Nachman Corp.*,

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<sup>4</sup> ERISA’s legislative findings do not mention “cost-effective plan administration,” “minimizing administrative and financial burdens,” or “promotion of plan formation.” Accordingly, these goals are secondary to the Act’s stated policies – the principal of which is the “protection of employee benefit rights.” *Cf.* ERISA § 2, 29 U.S.C. § 1001 (reviewing the necessity for enactment to protect participants and beneficiaries).

446 U.S. at 374-75 (purpose of ERISA was to prevent the “great personal tragedy” suffered by employees whose retirement benefits were not paid); *see generally* ERISA § 2(a), 29 U.S.C. § 1001(a).

For many people, outside of Social Security, employee benefit plans are the main source of retirement assets.<sup>5</sup> As longevity, and thus the amount of assets needed to live comfortably in retirement increases,<sup>6</sup> these retirement plans become even more important.

When an employer fails to pay the pension benefits expected at retirement, it wreaks financial havoc upon employees and their families by destroying a lifetime of planning for their retirement years. Retirement typically occurs at an age where employees no longer have the option or the time to start all over again in hopes of obtaining a new pension. *See* Treasury Inspector General for Tax Administration, *Statistical Trends in Retirement*

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<sup>5</sup> While defined contribution plans have largely replaced traditional pensions for many younger workers in the private sector, traditional pensions are still the more important source of wealth for middle-quintile households near retirement today. Gordon B. T. Mermin, The Urban Institute, *Typical Wealth Held by Those at the Verge of Retirement* (Mar. 2008), [http://www.urban.org/UploadedPDF/411618\\_typical\\_wealth.pdf](http://www.urban.org/UploadedPDF/411618_typical_wealth.pdf).

<sup>6</sup> A.H. Munnell, A. Webb & F. Golub-Sass, *The National Retirement Risk Index: After The Crash* 1, 2, 6 (IB # 9-22 Oct. 2009), [http://crr.bc.edu/briefs/the\\_national\\_retirement\\_risk\\_index\\_after\\_the\\_crash.html](http://crr.bc.edu/briefs/the_national_retirement_risk_index_after_the_crash.html) (from 2004 to 2009, the percent of households who are at risk of being unable to maintain their standard of living in retirement increased from 43% to 51%).

*Plans* at 14 (Ref. No. 2010-10-097 Aug. 9, 2010), <http://www.treas.gov/tigta/auditreports/2010reports/201010097fr.pdf>. The long-term effect of an employer reneging on its benefit promise is devastating and emotionally shattering for employees and their families. *See generally Muscemi v. Schwegmann Giant Super Mkts*, 159 F. Supp. 2d 329 (E.D. La. 2001), *aff'd in part & vacated in part*, 332 F.3d 339 (5<sup>th</sup> Cir. 2003).

**D. Congress Intended That ERISA's Disclosure And Notice Requirements Inform Employees Of The Benefits They Should Expect – Or Not Expect – From A Plan.**

If employees do not receive accurate information which permits them to determine their rights and obligations under an employee benefit plan, it is impossible for them to determine what, if any, actions they must take to protect their rights, or to make informed decisions concerning their benefits and employment. *See Korobkin & Ulen*, at 1064 (“actors should be able to compare the utility consequences of all alternatives to each other”). If workers have undue difficulty obtaining accurate pension information, they make myopic and suboptimal decisions regarding when to retire or how much to save for retirement. *See Olivia S. Mitchell, Worker Knowledge of Pension Provisions*, 6(1) J. LAB. ECON. 22, 36 (Jan. 1988) (*id.*). This is particularly true in cash balance conversions, like the retirement plan at issue, because the transition formulas are complicated.

In contrast, disclosures that are accurate and understandable in accord with ERISA's statutory and regulatory requirements, ERISA §§ 101-104, 29 U.S.C. §§ 1021-1024, *see also* 29 C.F.R. §§ 2520.102-2 & 102-3; 29 C.F.R. §§ 2520.104b-1 – 104b-4, can equip participants with the information they need to make informed decisions concerning their benefits and employment, ranging from protesting for changes in benefit plans and improved compensation,<sup>7</sup> looking for new employment, saving

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<sup>7</sup> The backlash from some of IBM's employees to IBM's cash balance conversion was legendary among employers, and had to be known to CIGNA's executives. It illustrates that employee protests about benefit losses or requests for additional compensation to make up for them can be effective with far less than 100% participation. *E.g.*, Richard A. Oppel, Jr., *Companies Cash In on New Pension Plan; But Older Workers Can Face Penalties*, N.Y. TIMES, Aug. 20, 1999, <http://www.nytimes.com/1999/08/20/business/companies-cash-in-on-new-pension-plan-but-older-workers-can-face-penalties.html?scp=2&sq=%22IBM%22+and+%22protest%22&st=nyt> ("But it is I.B.M.'s conversion that has set off the harshest and most publicized reaction from its employees. Since the company, based in Armonk, N.Y., disclosed the change this spring, the backlash has turned into a social movement of sorts, with fuming employees conspiring via E-mail to protest and pressure their company to rescind the conversion."); Darryl K. Taft & Edward F. Moltzen, *IBM Employees March Against Pension Change*, CRN TECHNOLOGY NEWS, July 3, 1999, [http://www.crn.com/news/channel-programs/18803847/ibm-employees-march-against-pension-change.htm;jsessionid=1PvgJ47qMLCzvP3OgG+UxQ\\*\\*.ecappj01](http://www.crn.com/news/channel-programs/18803847/ibm-employees-march-against-pension-change.htm;jsessionid=1PvgJ47qMLCzvP3OgG+UxQ**.ecappj01); Ellen E. Schultz & William M. Bulkeley, *IBM Pension-Plan Changes Are Ruled Discriminatory*, THE WALL STREET JOURNAL ONLINE, Aug. 1, 2003, <http://online.wsj.com/article/0,,SB105968406937956700,00.html> ("IBM's conversion to a cash-balance plan in 1999 led to a fire storm of protest from longtime employees, who estimated their pensions would fall by 20% to 40% or more. In

more, or working longer.<sup>8</sup> A strong reaction by CIGNA's employees to cuts in benefits, such as the significant benefit reduction caused by the wear-aways at issue in its pension plan,<sup>9</sup> would not have been surprising because people react very strongly to losses, a phenomenon known as "loss aversion." Richard Thaler & Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale 2008), at 112, 120 ("people hate to see their paychecks go down"; "[r]oughly speaking, they hate losses about twice as much as they like gains").

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response, the company relented and allowed people older than 40 with 10 years of service to remain in the prior plan if they wished.”).

<sup>8</sup> As shown by surveys like one conducted by The Hartford Financial Services Group, people need to know about reductions in their retirement benefits not only to ask for unfavorable changes to be reconsidered, but also in order to make timely decisions to save more, to work longer or to work part-time during retirement. See *Study from the Hartford Finds Economy Takes Toll on Pre-Retirees and Their Retirement Dreams*, <http://ir.thehartford.com/releasedetail.cfm?releaseid=512699>.

<sup>9</sup> Although most workers experienced some benefit reductions, older workers experienced greater losses of expected benefits than younger workers; the median benefit reduction for workers at age 30 at the conversion was \$59 per month versus \$238 per month for workers at age 50. U.S. Gov't Accountability Office, GAO-06-42, *Private Pensions: Implications of Conversions to Cash Balance Plans* 36-38 (2005).

Regardless of whether participants thoroughly read the disclosures at the outset,<sup>10</sup> refer to them when benefits are due,<sup>11</sup> or learn of changes from the approximately twenty percent of employees who are the experts in the workplace,<sup>12</sup> accurate, timely and meaningful disclosures work. When employees fail to receive accurate required information, whether through omission or affirmative misrepresentation, Congress' carefully crafted reporting and disclosure scheme and the protections which flow from that scheme are effectively destroyed.

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<sup>10</sup> CIGNA's own survey demonstrated that 92% of employees said they thoroughly read the summaries that CIGNA provided them. *See* J.A. 895a. Numerous employees including the class representatives testified that they had read the summaries. *See* J.A. 149a-150a, 168a, 182a-183a, 203a-204a, 213a, 222a, 229a-230a.

<sup>11</sup> *See* ERISA Advisory Council, *Report of the Working Group*, [http://www.dol.gov/ebsa/publications/AC\\_1105b\\_report.html](http://www.dol.gov/ebsa/publications/AC_1105b_report.html) (many participants use their summaries as a reference manual similar to a car manual).

<sup>12</sup> *See* Chan & Stevens, at 260-61 (the approximately twenty percent of employees who understand their retirement plans and how they work drive the provisions in the plans); *see also* Esther Duflo and Emmanuel Saez, *The Role of Information and Social Interactions in Retirement Plan Decisions*, 118(3) Q. J. ECON. 816-820 (Aug. 2003) (persons who may not be literate enough to understand an SPD and those who rely on SPDs as reference guides "may obtain information about the employer retirement plan from discussions with their colleagues, or make inferences based on observing their decisions").



**II. IN RESOLVING A CONFLICT BETWEEN THE FORMAL PLAN DOCUMENT AND THE SUMMARY PLAN DESCRIPTION, THE USE OF A DETRIMENTAL RELIANCE STANDARD IS INCONSISTENT WITH ERISA'S PURPOSES AND TERMS.**

ERISA's statutory language neither creates nor compels a subjective reliance or prejudice standard in its disclosure requirements, *see* ERISA §§ 101-104, 29 U.S.C. §§ 1021-1024, and one should not be inferred from the statute's clear language. *See Hardt*, 130 S. Ct. at 2156; *see also* 29 C.F.R. §§ 2520.102-2 & 102-3; 29 C.F.R. §§ 2520.104b-1 – 104b-4.

Under CIGNA's approach, only an individual employee who reads, understands, and remembers specific provisions of the summaries, and then takes individual action can possibly recover when there is a conflict between the formal plan document and the summary plan description.

Although summary plan descriptions are the primary source of benefits information, they are frequently written at a literacy level higher than the average plan participant can understand.<sup>13</sup> Given

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<sup>13</sup> *See* ERISA Advisory Council, *Report of the Working Group*, [http://www.dol.gov/ebsa/publications/AC\\_1105b\\_report.html](http://www.dol.gov/ebsa/publications/AC_1105b_report.html); *see generally* Colleen Medill, Richard Wiener, Brian Bornstein, E. Kiernan McGorty, *How Readable Are Summary Plan Descriptions for Health Care Plans?*, 27 EBRI NOTES, No. 10 at 1-2 (Oct. 2006) (assessment of samples of forty health plan summary plan descriptions health plans for readability and understandability found they were written at a first year

the documented high levels of financial illiteracy among Americans, it is not surprising that summary plan descriptions would be difficult for many people to understand.<sup>14</sup>

Moreover, retaining memories of difficult written materials, like summary plan descriptions, read over a decade ago is unrealistic. The more complex a document, the less a person will remember. *See* A. Baddeley, *Working Memory: Looking Back And Looking Forward*, 4 NEUROSCIENCE 829, 832 (Oct. 2003). The abilities of individuals to process complex financial information may affect retention and understanding of their pension plans. *See* Sewin Chan & Ann Huff Stevens, *What You Don't Know Can't Help You: Pension Knowledge and Retirement Decision Making*, NATIONAL BUREAU OF ECONOMIC RESEARCH, Working Paper No. 10185 (Dec. 2003), at 24. Moreover, an individual's memory of how something is learned is imprecise.<sup>15</sup> Finally, recollection of

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college level); Jerry Haar and Sharon Kossack, *Employee Benefit Packages: How Understandable Are They?*, 27:2 J. BUS. COMM. 185, 190 (Mar. 1990) (assessment of samples of benefits packages from Fortune 500 corporations showed that both the documents' readability and comprehensibility levels far exceed that of the average worker).

<sup>14</sup> *See* Financial Industry Regulatory Authority Investor Education Foundation, *Financial Capability in the United States: National Survey* at 18 (Dec. 2009), <http://www.finrafoundation.org> (less than one-third correctly answered all three questions about interest rates, inflation and risk diversification).

<sup>15</sup> *See* n. 9 & 11, *supra*.

missing information in a summary plan description like reductions in benefits requires proof of a negative. The proximate connection between reading the summary plan description, remembering that information was missing, and taking a certain action is impossible to prove years later.

Given that many participants already have trouble understanding a summary plan description that is written correctly and accurately, a legal rule that they must be able to infer that certain provisions of a lengthy summary plan description are inaccurate, misleading, or missing, and speculate about what they would have done with full disclosure is unrealistic. Individuals are particularly vulnerable to exploitation and manipulation when disclosures are inadequate and misleading. *See* A. Lusardi, O. Mitchell & V. Curto, *Financial Literacy and Financial Sophistication in the Older Population: Evidence from the 2008 HRS*, MRRC Working Paper 2009-216 at 8 (2009), *cf.* Luchak & Gunderson, at 650-51, 664-65 (employers can take advantage of ignorance concerning pension plan provisions, enabling redistribution of benefits to more valued workers). Significantly, the long-term financial impact on participants who receive inaccurate or misleading pension information is considerable. *See* Mitchell, at 36 (myopic and suboptimal decisions due to poor information regarding when to change jobs, when to retire, or how much to save for retirement). CIGNA's approach necessarily thwarts employees who are average plan participants from being able to recover

their benefits;<sup>16</sup> indeed, it would thwart recoveries by everyone except the extraordinary few.

Most significantly, under CIGNA's approach, plan administrators would have no incentive to comply with the statutory and regulatory requirements that summary plan descriptions be understandable because the Department of Labor does not review the summaries for compliance. *See* ERISA Advisory Council, *Report of the Working Group*; *see generally* Luchak & Gunderson, at 650-51, 664-65 (many employees are not well-informed about eligibility, generosity and structure of their pension plans); Mitchell, at 35-36.

For all of these reasons, a standard of individualized detrimental reliance or prejudice will be impossible for most individuals to meet.<sup>17</sup>

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<sup>16</sup> Although 84.6 percent of adults over age 25 had a high school or higher degree in 2003, National Center for Education Statistics, *Digest of Education Statistics, 2009* at Table 8 (Apr. 2010), [http://nces.gov/progrmas/digest/d09/tables/dt09\\_008.asp?referrer+report](http://nces.gov/progrmas/digest/d09/tables/dt09_008.asp?referrer+report), 43 percent of adults fell into the Basic or Below Basic literacy level, signifying difficulty in reading, comprehension, computation, communication, writing, and problem solving. U.S. Dep't of Education, National Center for Education Statistics, Institute of Education Sciences, *Literacy in Everyday Life: Results From the 2003 National Assessment of Adult Literacy* at 13 (Apr. 2007), <http://nces.ed.gov/naal>.

<sup>17</sup> At no time did CIGNA argue that it had committed a "scriveners' error." In such cases, the plan must show by objective, convincing evidence both that there was a drafting error and the error was inconsistent with plan participants' expected benefits. *See, e.g., Young v. Verizon's Bell Atl. Cash Balance Plan*, 2010 U.S. App. LEXIS 16483 (7<sup>th</sup> Cir. 2010); *see generally* David A. Pratt & Martin M. Heming, *Focus*

*Compare with Young v. Verizon's Bell Atl. Cash Balance Plan*, 2010 U.S. App. LEXIS 16483 (7<sup>th</sup> Cir. 2010) (requiring plan to prove the reasonable expectations of the class, not each individual participant). Instead, the Court should adopt a standard for determining which plan document controls when there is a conflict between them which is consistent with both the language of ERISA and its purposes.

**CONCLUSION**

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals on this issue.

Respectfully submitted,

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