

**GEORGETOWN UNIVERSITY LAW CENTER  
SUPREME COURT INSTITUTE**

**SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 2010 PREVIEW**

September 20, 2010

**A LOOK AHEAD AT OCTOBER TERM 2010**

disclosure statement, the creditor must “mail or deliver written notice” of that change in terms before the effective date of the change. 12 C.F.R. § 226.9(c).

Credit card issuing banks generally provide the requisite initial disclosures in or with the contract document that governs the credit card account. Such cardholder agreements commonly specify a standard periodic rate of interest and also that, if the cardholder defaults in a certain manner, then the creditor may increase the periodic rate on the account up to an identified default rate. The question presented is:

When a creditor increases the periodic rate on a credit card account in response to a cardholder default, pursuant to a default rate term that was disclosed in the contract governing the account, does Regulation Z, 12 C.F.R. § 226.9(c), require the creditor to provide the cardholder with a change-in-terms notice even though the contractual terms governing the account have not changed?

**Summary:**

Respondent filed a class action lawsuit against petitioner Chase Bank, claiming that Chase violated the disclosure provisions of the Federal Reserve Board Regulation Z when it failed to provide notice before increasing interest rates because of consumer defaults. Under Regulation Z, a bank must provide an initial disclosure statement including “each periodic rate” that may be used to compute interest, and must then disclose any change to those terms before the change is effective. In this case, Chase’s initial disclosure provided that the rate charged may increase, up to a specified maximum, if the consumer fails to make timely payments. The question is whether subsequent enforcement of that provision, in the form of an increased rate, is a change that requires a separate notice.

Relying on the Board’s Official Staff Commentary to Regulation Z, the Ninth Circuit held that a separate notice is required where, as here, the original disclosure provides for a discretionary increase within a range of rates and does not specify “the actual amount of the increase and whether it will occur.” Since the Ninth Circuit issued its opinion, the Board has interpreted the relevant version of Regulation Z (since superseded) differently, as not requiring a change-in-terms notice under circumstances like those here. As a result, the Court will now consider not only the merits of the original decision but the degree of deference to be afforded the agency’s interpretation.

**Decision Below:**

559 F.3d 963 (9th Cir. 2009)

**Petitioner’s Counsel of Record:**

Seth Waxman, Wilmer Cutler Pickering Hale and Dorr LLP

**Respondent’s Counsel of Record:**

Deepak Gupta, Public Citizen Litigation Group

**ERISA**

*Amara v. CIGNA Corp.* (09-804)

**Question Presented:**

Whether a showing of “likely harm” is sufficient to entitle participants in or beneficiaries of an ERISA plan to recover benefits based on an alleged inconsistency between the

explanation of benefits in the Summary Plan Description or similar disclosure and the terms of the plan itself.

**Summary:**

This case concerns the showing that must be made by ERISA plan beneficiaries before they can recover benefits for a violation of ERISA's notice provisions. When respondent CIGNA converted its traditional defined benefit plan to a cash balance plan, many participants experienced extended "wear away" periods in which they worked without accruing any additional benefits. A group of participants brought a class action lawsuit against CIGNA alleging, in part, that CIGNA had violated ERISA's notice provisions, including the requirement that participants be provided with a summary plan description ("SPD") and summary of any material modifications ("SMM") in a form that is clear, easily understood, and not misleading. The district court held that CIGNA's SPD and SMM were inadequate because they failed to disclose the possibility of "wear away" periods and included affirmative "material misrepresentations" suggesting benefit increases. The court rejected CIGNA's argument that, as a condition of recovery of benefits, each plan participant should be required to prove detrimental reliance on the SPD or SMM. Instead, the court ordered class-wide recovery based on its finding that the class as a whole had shown "likely harm," in that CIGNA's failure to provide adequate notice had deprived employees of the chance to protest the change to their benefit plans. The Second Circuit summarily affirmed in an unpublished decision, based "substantially [on] the reasons stated" by the district court.

Petitioner argues that the ruling below imposes a form of "strict liability" on ERISA plan administrators, in that they may be held liable for even a minor shortcoming in providing notice without proof that any participant ever relied on or even read the faulty SPD or SMM. The result, petitioner warns, will be "windfall" recoveries inconsistent with ERISA's objectives, needlessly long and complex SPDs designed to address every possible objection, and a counter-productive reluctance to make material modifications to ERISA plans. Resolution of this question may have much larger implications for the availability of class actions in the ERISA context: A requirement that plan participants must show individual reliance on an SPD or SMM in order to recover could be a significant obstacle to class certification.

**Decision Below:**

348 F. App'x 627 (2d Cir. 2009)

**Petitioner's Counsel of Record:**

Theodore B. Olson, Gibson, Dunn & Crutcher LLP

**Respondent's Counsel of Record:**

Stephen R. Bruce