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Supreme Court Clarifies Individual Participant's Right to Seek Relief for Fiduciary Breach Under ERISA

On February 20, 2008, the U.S. Supreme Court issued its decision in *LaRue v. DeWolff, Boberg & Associates, Inc.* (“*LaRue*”).¹ The decision has significant implications for litigation involving plans subject to the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

Background

Mr. LaRue participated in a 401(k) defined contribution plan. Contributions under the plan were allocated to participants' individual accounts, and LaRue was permitted to direct the investment of his account among the plan's investment options. He alleged that he made investment elections that were never carried out and, as a result, his account was “depleted” by \$150,000, and that the failure to implement his instructions was a breach of fiduciary duty by the responsible plan fiduciaries.²

LaRue originally sued under ERISA § 502(a)(3), which permits a civil action in federal district court by a participant, beneficiary or fiduciary “(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.”

However, a series of Supreme Court decisions³ have created doubt as to whether “money damages” are available in a suit under § 502(a)(3), and the district court dismissed LaRue's claim on the basis that the relief he was seeking was unavailable under § 502(a)(3).⁴

On appeal, LaRue argued that he was, indeed, entitled to relief under § 502(a)(3). He also argued that he was entitled to relief under § 502(a)(2), which permits a civil action by the Secretary of Labor or by a participant, beneficiary or fiduciary for “appropriate relief” under § 409 of ERISA. That section provides:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

The Court of Appeals rejected both of LaRue's arguments and upheld the district court's dismissal of his claim.⁵ The Supreme Court granted *certiorari* (i.e., agreed to review the Court of Appeals decision).

¹ The slip opinion of the Court's decision is available at <http://www.supremecourtus.gov/opinions/07pdf/06-856.pdf>. All cites to the Supreme Court's opinion refer to that slip opinion (cited as “Slip Op.”).

² Slip Op. at 2.

³ *Sereboff v. Mid Atlantic Medical Services*, 126 S. Ct. 1869 (2006); *Great-West Life Annuity Ins. Co. v. Knudson*, 534 U.S. 202 (2002); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993).

⁴ Slip Op. at 2-3.

⁵ *LaRue v. DeWolff, Boberg & Associates, Inc.*, 450 F.3d 570, *reh'g denied*, 458 F.3d 359 (4th Cir. 2006).

The Issue

At the heart of the § 502(a)(2) issue in *LaRue* is an earlier Supreme Court ERISA decision, *Massachusetts Mutual Life Ins. Co. v. Russell* (“*Russell*”).⁶ The plaintiff in *Russell* was covered by a disability benefits plan. While she received the benefits she sought under the plan, there were delays, and she sued the plan fiduciaries under § 502(a)(2) for extra-contractual and punitive damages based on the delay in payment of her benefits.⁷ The Court held that such damages were not available under § 502(a)(2) and, in doing so, indicated that § 502(a)(2) was concerned with “remedies that would protect *the entire plan*, rather than with the rights of an individual beneficiary.”⁸

Since *LaRue* was seeking recovery only for his own account, the Court of Appeals characterized his claim as one for individual relief under § 502(a)(2) that did not benefit “the plan as a whole,” citing *Russell*.⁹

The Supreme Court’s Analysis

It required three separate opinions among them, but the Justices all agreed that *LaRue*’s claim was permitted under § 502(a)(2). Because of its decision on this § 502(a)(2) issue, the Supreme Court did not address whether *LaRue* had a claim under § 502(a)(3).¹⁰

The opinion of the Court (written by Justice Stevens, joined by four other Justices) states that the fiduciary breach alleged by *LaRue* “falls squarely within” the category of fiduciary breaches covered by ERISA.¹¹ It goes on to distinguish this case from *Russell*: “Our references to the ‘entire plan’ in *Russell* . . . are beside the point in the defined contribution [plan] context.”¹² Therefore, although § 502(a)(2) does not provide a remedy for individual relief, as distinct from plan relief, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets allocated to a participant’s individual account.¹³

Justice Stevens explained that the reason for distinguishing *Russell* was a “change in the landscape” of employee benefit plans. *Russell* concerned plans that did not have individual accounts, but “[w]hether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409.”¹⁴

Justice Thomas, in a concurring opinion, relied on the “unambiguous text” of the ERISA provisions to support the majority holding: “On their face, §§ 409(a) and 502(a)(2) permit recovery of *all* plan losses caused by a fiduciary breach.”¹⁵ Therefore, “[b]ecause a defined contribution plan is essentially the sum of its parts, losses attributable to the account of an individual participant are necessarily ‘losses to the plan’ for purposes of § 409(a).”¹⁶

Why *LaRue* is Important

Under *LaRue*, a suit for losses due to an alleged breach of fiduciary duty may now be brought under ERISA § 502(a)(2) without regard to whether the relief sought goes to the entire plan or only to certain accounts under the plan.¹⁷ As a result, plans and fiduciaries are likely to experience more litigation based on alleged fiduciary breaches. It would also appear that in a “stock drop” or “401(k) fees” class action, a defense that § 502(a)(2) relief is unavailable because the relief sought would go to individual participants’ accounts, might be unsuccessful after *LaRue*.

⁶ 473 U.S. 134 (1985).

⁷ 473 U.S. at 133-34.

⁸ *Id.* at 140-42.

⁹ *LaRue v. DeWolff, Boberg & Associates, Inc.*, 450 F.3d 570, 573-74 and 458 F.3d 359, 361-62.

¹⁰ Slip Op. at 4.

¹¹ *Id.* at 5.

¹² *Id.* at 7.

¹³ *Id.* at 7-8.

¹⁴ *Id.* at 7.

¹⁵ *Russell*, Thomas, J. concurring at 2.

¹⁶ *Id.* at 3.

¹⁷ Nothing in *LaRue* changes *Russell* to the extent that the earlier case holds that the kind of outside-the-plan damages sought by the plaintiff there are not permitted under §§ 409(a) and 502(a)(2). See the footnote at the end of Justice Thomas’ concurring opinion.

Chief Justice Roberts wrote a concurring opinion which is already getting attention in the ERISA litigation world. While he concurred in the result, he raised and discussed a question that had not been considered by the courts below. That question was whether LaRue's claim really concerned the amount of benefits to which he was entitled and should have been brought under a different section of ERISA, § 502(a)(1)(B).¹⁸

The Chief Justice was concerned that allowing relief under § 502(a)(2) in situations where a § 502(a)(1)(B) claim was available would allow plaintiffs to recast benefit claims as fiduciary breach claims, and circumvent ERISA's claims procedures, as interpreted by the federal courts.¹⁹ Specifically, he noted, this could permit plaintiffs to avoid exhausting the plan's internal claim and appeals procedures and deprive the plan of the benefit of a presumption in favor of its decision if the participant challenged that decision in a § 502(a)(1)(B) suit.²⁰ He suggested that "other courts in other cases remain free to consider what we have not – what effect the availability of relief under § 502(a)(1)(B) may have on a plan participant's ability to proceed under § 502(a)(2)."²¹

Participants may not be pleased to have courts consider that issue. If a participant claims, say, that a fiduciary looted a participant's 401(k) plan account, the participant might first have to go through the plan's claim and appeals procedure to establish what his account should have been, and, perhaps, then go to court if the plan-level decision was adverse. In that suit, the participant would face the plan's claim that its decision was subject to deferential review by the court. If the participant ultimately established that his account was less than it should have been, there would still be the question of how the account would be made whole – defined contribution plans generally have no unallocated funds to apply in such a situation. The participant might then have to bring suit under § 502(a)(2) against the fiduciary. This just goes to illustrate the complex issues that will be raised in subsequent litigation.

We can't predict how other courts will deal with Justice Roberts' concerns or other issues discussed but not decided in *LaRue*, but it is certain that the courts will have to address them. In the meantime, if you have any questions about *LaRue*, please contact one of the attorneys listed in this Advisory or an attorney with whom you regularly deal at Katten Muchin Rosenman LLP.

¹⁸ "A civil action may be brought 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."

¹⁹ *Russell*, Roberts, C.J. concurring at 2-3.

²⁰ *Id.* at 3-4.

²¹ *Id.* at 4. In his opinion, Justice Stevens noted that the Court was not considering the issue of whether LaRue had to exhaust his remedies under the plan before bringing his suit. Slip Op. at 4 & n.3.

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