

Client Alert

A report
for clients
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of the Firm February 2008

U.S. Supreme Court Rules Monetary Relief is Available for Claim that ERISA Fiduciary Breach Caused Losses to an Individual's 401(k) Plan Account

On February 20, 2008, in *LaRue v. DeWolff, Boberg & Associates, Inc.*, No. 06 Civ. 856, the U.S. Supreme Court concluded that a participant in a defined contribution pension plan may sue a fiduciary under Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(2), when the claim is that the fiduciary breach caused an individual loss to his 401(k) plan account. The Court determined that, when the plan at issue is a defined contribution plan, the number of participants affected or the percentage of plan assets at issue is irrelevant. This ruling expands the ERISA fiduciary claims for which plaintiffs can potentially seek make-whole monetary relief. The ruling leaves several questions unanswered, however, and Justice Roberts' concurring opinion may reignite the debate over the applicability of ERISA's exhaustion requirement to fiduciary breach claims.

Background and Lower Courts' Decisions

LaRue was a participant in his employer's 401(k) plan; plan terms permitted him to direct his investments among a menu of investment options. LaRue alleged that the plan fiduciaries breached their fiduciary duties by failing to carry out his investment instructions, and that as a result his individual account balance was depleted by approximately \$150,000. The district court dismissed this claim, concluding that LaRue's requested monetary relief did not constitute "appropriate equitable relief" under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3).

On appeal, the Fourth Circuit Court of Appeals affirmed the district court's ruling on Section 502(a)(3), and also held that LaRue could not bring a new claim under Section 502(a)(2), which authorizes a civil action by a participant, beneficiary or fiduciary to recover losses to the plan. Relying on the Supreme Court's decision in *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985), the Fourth Circuit reasoned that recovery under Section 502(a)(2) "must 'inure to the benefit of the plan as a whole,' not to particular persons with rights under the plan," and that LaRue was seeking only personal recovery for losses to his individual account.

Supreme Court's Decision

Although the Court's grant of *certiorari* included the Section 502(a)(3) issue, this issue was not addressed, as the five-judge majority opinion, authored by Justice Stevens, decided the case on Section 502(a)(2) grounds.

The Court acknowledged that the Fourth Circuit's decision was consistent with the Court's "plan as a whole" language in *Russell, supra*, but nevertheless concluded that the rationale for *Russell* supported LaRue's claim. *Russell* reasoned that Section 409 of ERISA, which is enforced through Section 502(a)(2), was focused on protecting plan assets from losses caused by fiduciary breaches. The *LaRue* Court observed that the "plan as a whole" requirement makes sense when the claim involves a defined benefit plan because, in that context, participants are being protected from "default risk" if the plan were unable to provide the promised defined benefit. In contrast, in the defined contribution context (such as a 401(k) plan), losses to a few or to even one individual's account can result in the loss of benefits to participants.

Applying this distinction, the Court held that although Section 502(a)(2) "does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." The majority pointed out that, while the record below was unclear as to the size of LaRue's plan account, its holding would

be no different whether LaRue's account includes 1% or 99% of the plan's assets. The Court also made clear, however, that its ruling did not determine whether plan exhaustion or other defenses may apply to this claim.

There were two concurring opinions, both of which agreed that the Fourth Circuit erred. The concurrence of Chief Justice Roberts, joined by Justice Kennedy, is of particular interest because it stated that the Court's opinion did not decide whether this type of claim may be required to be brought as a claim for benefits under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). Chief Justice Roberts reasoned that when the right at issue arises under the plan terms, as it did here, then such a claim would appear to fall naturally under Section 502(a)(1)(B). Chief Justice Roberts was animated by the concern that, if this type of claim were nonetheless allowed to be pursued under Section 502(a)(2), it may bypass the safeguards of plan exhaustion and deference to plan administrators applicable to claims for benefits under Section 502(a)(1)(B).

Implications for Plan Sponsors and Fiduciaries

The Court's ruling expands the potential ERISA fiduciary claims for which individual plaintiffs can seek make-whole economic relief. If plaintiffs can show that the breach caused a loss or diminution of plan assets allocated to an individual's 401(k) or other defined contribution account, the majority's opinion suggests that such a claim typically may be brought under Section 502(a)(2). This does not mean that all fiduciary breach claims may be fit under Section 502(a)(2), however, since many claims do not involve the loss of plan assets, or involve breaches that caused participants to lose benefits otherwise due from the plan. Finally, Chief Justice Roberts' concurrence opens the door to the possibility that, when the right at issue arises under the plan terms, not ERISA, these claims may be required to be brought subject to the rules and procedures applicable to claims for benefits under Section 502(a)(1)(B), including, potentially, the exhaustion of plan administrative remedies.

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