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Supreme Court Decision Allows ERISA Remedy for Individual Damages Claims for Breach of Fiduciary Duty

On February 20, 2008, the U.S. Supreme Court unanimously decided *LaRue* v. *DeWolff, Boberg & Associates, Inc*.[1] The Supreme Court held that the Employee Retirement Income Security Act of 1974 ("ERISA")[2] permits a participant in a defined contribution plan to sue a fiduciary under § 502(a)(2) of ERISA for investment losses to the participant's individual account caused by a breach of fiduciary duty. The Supreme Court's decision overturned an earlier decision of the Fourth Circuit Court of Appeals which held that ERISA permitted individual participants to recover for losses only on behalf of an entire plan, and not for losses to the participant's individual account.[3] The Court's decision resolved what had been a split within lower courts as to whether a plaintiff may invoke § 502(a)(2) of ERISA to redress injuries sustained by less than the entire plan.[4]

I. Background

Congress enacted ERISA to provide a uniform federal regulatory regime that governs employee benefits plans.[5] Section 502(a) of ERISA identifies six types of civil actions that may be brought by various parties. Section 502(a)(2) of ERISA authorizes a civil action by the Secretary of Labor or by "a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title [section 409 of ERISA]." Section 409 of ERISA provides in relevant part that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon

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1 No. 06-856, slip op. (U.S. Feb. 20, 2008) ("*LaRue* Slip Op.").

2 29 U.S.C. 1001 *et seq.*

3 *LaRue* v. *DeWolff, Boberg & Associates, Inc*., 450 F.3d 570 (4th Cir. June 19, 2006).

4 *Compare In re Schering-Plough Corp. ERISA Litigation*, 420 F.3d 231, at 235-36 (3d Cir. 2005) (holding that sub-class of plan participants could state cause of action under § 502(a)(2) of ERISA), and *Kuper* v. *Iovenko*, 66 F.3d 1447, 1452-53 (6th Cir. 1995) (holding that injuries to sub-class of plan participants was injury to entire plan), with *Milofsky* v. *American Airlines*, 404 F.3d 338 (5th Cir. 2005) (holding that sub-class of plan participants could not invoke § 502(a)(2) of ERISA for redress of injuries to sub-class), and *Lee* v. *Burkhart*, 991 F.2d 1004 (2d Cir. 1993) (denying individual claims under § 502(a)(2) of ERISA because "plaintiffs are seeking damages on their own behalf, not on behalf of the plan").

5 *LaRue* v. *DeWolff, Boberg & Associates, Inc*., 450 F.3d 570, at 572 (4th Cir. June 19, 2006).

fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach."[6] In *Massachusetts Mutual Life Ins. Co.* v. *Russell* ("*Russell*"), the Supreme Court interpreted this language as protecting the rights of "the entire plan, rather than ...the rights of an individual beneficiary."[7]

II. Facts and Procedural History of LaRue

DeWolff, Boberg & Associates, Inc., was a management consulting firm that administered an ERISA-covered 401(k) retirement savings plan for its employees. The plan terms permitted the individual employees to direct the investments of their respective plan accounts among a menu of investment options. The plaintiff, LaRue, was a participant in this 401(k) plan. LaRue alleged that the plan administrators failed to effect his particular choice of investments and that their failure depleted his interest in the 401(k) plan by approximately $150,000.

The U.S. District Court for South Carolina dismissed LaRue's claim, concluding that plaintiff's requested monetary relief did not constitute "appropriate equitable relief" under § 502(a)(3) of ERISA. Plaintiff appealed to the Fourth Circuit Court of Appeals, arguing that in addition to his claim under § 502(a)(3) of ERISA, he also had a cognizable claim under § 502(a)(2) of ERISA. Relying on *Russell*, the Fourth Circuit held that § 502(a)(2) of ERISA "provides remedies only for entire plans, not for individuals....[r]ecovery under this subsection must 'inure[ ] to the benefit of the plan *as a whole*,' not to particular persons with rights under the plan."[8] The Supreme Court disagreed.

III. Rationale of the Court

Justice Stevens, writing for a majority of the Supreme Court, explained that the holding in *Russell* was specific to defined benefit plans like the plan involved in that case (which was a disability plan that paid a fixed benefit based on a percentage of the employee's salary). The opinion concluded that the rationale of *Russell* can be applied to the facts of *LaRue* and support individual relief in the context of defined contribution plans. The Supreme Court reconciled the facts in *LaRue* with the holding in *Russell* by drawing a distinction between defined benefit plans and defined contribution plans. Defined benefit plans generally promise to pay a fixed level of retirement income to an employee typically based upon the employee's years of service and compensation, while defined contribution plans promise the participant the value of an individual account which is largely a function of the contributions to the account and the investment performance of those contributions.[9] The Supreme Court noted that in the last 20 years, the "landscape" of employee benefit plans "has changed" from defined benefit plans being

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6 29 U.S.C. § 1109(a).

7 *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134 at 142 (1985).

8 *LaRue* v. *DeWolff, Boberg & Associates, Inc*., 450 F.3d 570, at 572-73 (4th Cir. June 19, 2006) quoting *Russell*, 473 U.S. 134 at 140 (1985).

9 *LaRue* Slip Op., n.1, citing §§3(34)-(35), 29 U. S. C. §§1002(34)-(35); P. Schneider & B. Freedman, ERISA: A Comprehensive Guide §3.02 (2d ed. 2003).

widely used to the current-day prevalence of defined contribution plans.[10] In the context of defined benefit plans, fiduciary misconduct by an administrator would "not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan."[11] On the other hand, the Supreme Court stated that fiduciary misconduct with respect to defined contribution plans need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. Justice Stevens explained that the Court's prior ruling in *Russell*, requiring that relief be sought on behalf of the "entire plan," is still applicable to defined benefit plans, but is not applicable to defined contribution plans.[12] Thus, the Court held that reduction in an individual's account caused by fiduciary misconduct is "the kind of harm[ ] that concerned the draftsmen of § 409" and should therefore be subject to remedy under § 502(a)(2) of ERISA.[13]

IV. Concurring Opinions

There were two concurring opinions. Chief Justice Roberts, joined by Justice Kennedy, wrote a separate opinion in which he agreed that the Fourth Circuit's analysis was flawed but did not agree that § 502(a)(2) of ERISA clearly authorized recovery in a case of this type. Chief Justice Roberts pointed out that LaRue's claim was arguably a claim under § 502(a)(1)(B) of ERISA, which allows a participant or beneficiary to bring an action to recover benefits due to him or her under the terms of the plan, to enforce his or her rights under the terms of the plan, or to clarify his or her rights to future benefits under the terms of the plan.[14] According to Chief Justice Roberts, if LaRue could bring his claim under § 502(a)(1)(B) of ERISA, he might not be able to do so under § 502(a)(2) of ERISA as well.[15] Claims under § 502(a)(1)(B) may entail certain safeguards for the plan administrator, including requiring that the participant exhaust his or her administrative remedies before filing suit and allowing an abuse of discretion standard of review for an administrator's discretionary plan interpretations.

The second concurring opinion, drafted by Justice Thomas and joined by Justice Scalia, agreed with the majority decision that § 502(a)(2) of ERISA allows for a claim of fiduciary misconduct by an individual participant in a defined contribution plan. However, Justice Thomas came to this conclusion based on the plain language of the statute rather than the reasoning of the majority which cited the shifting nature of the pension plan "landscape" as the basis for their allowing claims by individual participants.[16] Justice Thomas argued that losses to individual accounts in a defined contribution plan are in effect losses to the "entire plan" within the meaning of § 409A of ERISA. Therefore, the majority's distinction between defined contribution plans and defined benefit plans is superfluous. Justice Thomas explained that "[b]ecause a defined contribution plan is essentially the sum of its parts, losses attributable to

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10 *LaRue* Slip Op., at 6.

11 *Id*. at 7.

12 *Id.* at 7-8.

13 *Id.*

14 *Id.* at 1-2 (Roberts, C.J., concurring).

15 *Id*. at 2 (Roberts, C.J., concurring).

16 *Id.* at 1-2 (Thomas, J., concurring).

the account of an individual participant are necessarily losses 'to the plan'...and § 502(a)(2) permits that participant to recover such losses on behalf of the plan."[17]

V. Significance of Decision

The Supreme Court's ruling in *LaRue* supports an expansion of the types of ERISA claims which may be brought by defined contribution plan participants against plan fiduciaries for fiduciary misconduct. However in light of the of concurring opinion of Chief Justice Roberts, the *LaRue* decision leaves uncertainty as to how individual plan participants should proceed in order to bring claims for fiduciary misconduct.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at (212) 701-3403 or cgilman@cahill.com; Michael Macris at (212) 701-3409 or mmacris@cahill.com; Jon Mark at (212) 701-3100 or jmark@cahill.com; John Schuster at (212) 701-3323 or jschuster@cahill.com; Glenn J. Waldrip, Jr. at (212) 701-3110 or gwaldrip@cahill.com; or Heidi Spalholz at (212) 701-3436 or hspalholz@cahill.com.

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[17] *Id.* at 3-4 (Thomas, J., concurring).