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ERISA & Benefits Litigation Practice

Supreme Court Decision in *LaRue* May Increase Potential Liability for Plan Fiduciaries but May Also Offer Additional Defenses

The Supreme Court issued on February 20, 2008 its much-anticipated decision in the case of *LaRue v. DeWolff, Boberg & Associates, Inc*. No. 06-86, 2008 WL 440748 (2008). In that case, the Court was asked whether a plan participant in a defined contribution pension plan can sue a fiduciary under section 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA") (allowing recovery from a breaching fiduciary of losses to the plan) where the fiduciary's alleged misconduct impaired the value of the plan assets in the employee's individual account. At stake were the boundaries of an important limitation that ERISA fiduciaries have long enjoyed against claims for damages in the administration of an ERISA pension benefit plan.

The ERISA Provisions at Issue

ERISA establishes three principal causes of action for ERISA plan participants, but has generally been interpreted as providing limited compensatory relief for individual participants suffering financial loss due to administrative and other errors by a plan fiduciary. First, under ERISA § 502(a)(1)(B), participants may bring an action to recover benefits due them under the terms of a plan. Courts have interpreted section 502(a)(1)(B) to bar relief for extra-contractual remedies, such as compensatory damages. Moreover, when claims are brought under 502(a)(1)(B), claimants must first exhaust their administrative remedies, and the decision of the plan's administrator is often accorded substantial deference.

Second, under section 502(a)(2) participants may bring a civil action for appropriate relief under section 409 of ERISA. Section 409, in turn, states that a fiduciary shall be liable to make good to such plan any losses to the plan resulting from a breach of fiduciary duty. The Supreme Court, in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1995), stated that claims under this section of ERISA must "inure to the benefit of the plan as a whole," and not to particular persons with rights under the plan. Courts following *Russell* have regularly denied claims for alleged individualized losses, both in welfare and pension benefit claims. There has been a divide among the circuits, however, whether claims brought by a subclass of participants within a plan might appropriately be considered a claim on behalf of the plan as a whole.

Third, under § 502(a)(3), a participant may sue "to obtain other appropriate equitable relief." The Court has construed this statutory provision narrowly to limit any recovery to only those remedies historically available at equity. The Court has interpreted the phrase "appropriate equitable relief" to exclude claims for compensatory monetary damages, which are a classic form of *legal* relief.

Thus, as a practical matter, ERISA provided limited recourse where plan participants sought individualized consequential damages for alleged breaches of ERISA fiduciary obligations. For example, where

fiduciaries committed administrative errors in processing a trade request or in handling an insurance premium payment, such claims would not in most cases give rise to claims for compensatory damages under ERISA.

The Court's decision in *LaRue* could change that result to some extent, but the decision also may offer new defenses.

The Fourth Circuit Decision

In *LaRue*, the plaintiff participated in his employer's 401(k) retirement savings plan. He alleged that he directed the defendants to change the investments in his individual account, but that those instructions were not carried out. As a result, plaintiff claimed that this omission "depleted" his interest in the plan by $150,000. The Plaintiff alleged that this conduct was a breach of fiduciary duty, and sought to have the balance of his account restored under sections 502(a)(2) and (a)(3). The Fourth Circuit found that the "make whole" relief sought under section 502(a)(3) was not equitable relief, and that the plaintiff's claims under section 502(a)(2) could not be considered claims on behalf of the plan as a whole, since the plan was merely a conduit for funds that would flow to the plaintiff's account.

The Supreme Court's Decision

The Supreme Court agreed unanimously that the Fourth Circuit's decision should be vacated and remanded. But, with three opinions in the case, we believe that there are important issues that will now need to be addressed by the lower courts, and that these issues ultimately may return to the Supreme Court.

The majority opinion was written by Justice Stevens, and concluded that any impairment to the value of plan assets held in a participant's individual account in a defined contribution plan is an injury to the plan actionable under section 502(a)(2). The Court distinguished its decision in *Russell* on the grounds that *Russell* involved a defined benefit plan, where compensatory damages paid to individual participants would not impact the plan's assets. "Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan." 2008 WL 440748 at *5. "For defined contribution plans, however, fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. Whether 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." *Id.* The Court therefore held "that although § 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." *Id.* Significantly, the Court expressly disclaimed any holding under section 502(a)(3). The Court also noted in passing that it had earlier denied a motion to dismiss the writ of certiorari as moot because the plaintiff had withdrawn his assets from the plan.

This decision will have significant implications for plan fiduciaries. First, the decision resolves some of the jurisdictional issues faced by aggrieved participants who seek to bring an action for fiduciary breach where

the breach is narrowly confined to the participant's own account. Prior to this decision, some courts treated such claims as being for denial of benefits (under section 502(a)(1)(B)), or analogized to some equitable remedy (under section 502(a)(3)). Other courts would reject both approaches and deny a remedy altogether. Following *LaRue*, it is likely that plaintiff participants will argue that so long as they can show that the fiduciary breach somehow impaired the value of the plan assets in the participant's account, the claim may be brought under section 502(a)(2). This theory may expand fiduciary liability for damages resulting from procedural faults.

Second, the *LaRue* decision should affect the debate in the lower courts about whether ERISA "stock drop" claims – claims in which the plaintiff alleges that the fiduciary breached its obligations by offering the defendant company's stock as an investment alternative – can properly be brought where only some of the participants in the plan invested in the plan sponsor's stock. Participant plaintiffs who invested in company stock now will argue that because the decline in company stock will necessarily impair the value of those plan assets, those participants can recover under section 502(a)(2). The debate over "stock drop" claims now may shift to the application of section 502(a)(1)(B) of ERISA, as discussed below.

Third, the Court's rationale appears to limit the holding to defined contribution pension plans. The Court's logic – that a loss in value of the assets of one account results in a harm to the plan as a whole – would not appear to apply with respect to welfare benefit claims. Because welfare benefit plans typically are unfunded and define the benefits of participants, a fiduciary breach claim affecting only a limited number of participants would likely not be considered "on behalf of the plan." We also note that the Court reaffirmed the primacy of the limits set in *Russell* barring punitive or consequential damages.

<u>Benefits Claims v. Fiduciary Claims</u>

In a concurring opinion, joined by Justice Kennedy, Chief Justice Roberts suggested that if a participant could bring a claim for benefits under section 502(a)(1)(B), the participant may be barred from bringing such a claim under section 502(a)(2). We expect that this issue will receive substantial attention in the lower courts. Section 502(a)(1)(B) is an independent provision of ERISA, and plan administrators are usually granted substantial deference in deciding benefits claims. The concurring opinion by Chief Justice Roberts should substantially reduce attempts improperly to convert benefits claims to section 502(a)(2) claims. Similarly, the lower courts may require claimants to exhaust their administrative remedies under the plan before bringing suit. Such an exhaustion requirement would give ERISA plan administrators and fiduciaries an opportunity to address the participants' claims before litigation is thrust upon the plan.

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In short, the decision in *LaRue* opens up new avenues through which plaintiffs may seek to impose additional liability and litigation expense on plan fiduciaries for defined contribution plans, but it also identifies additional defenses in such actions.

If you have any questions about the impact of this decision or would like additional information, please contact any of the following members of Mayer Brown's ERISA & Benefits Litigation practice: Robert P.

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