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# *Liability of Plan Fiduciaries under ERISA: LaRue v. DeWolff, Boberg & Associates*


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**Abstract.** In LaRue v. DeWolff, Boberg & Associates, a participant in a 401(k) plan requested that plan administrators change an investment in his individual account. The plan administrators failed to make this change, and the individual's account allegedly suffered losses. The participant brought an action against his former employer and the 401(k) plan, claiming the plan administrator breached his fiduciary duty by neglecting to properly follow the investment instructions. At issue in the LaRue case was whether an individual could bring an action under ERISA to recover the losses. The Supreme Court held that a plan participant in a 401(k) plan could sue a plan fiduciary under Section 502(a)(2) of ERISA to recover losses caused by a fiduciary breach that only affected his individual account. This report discusses breach of fiduciary duty claims under ERISA Section 502(a)(2) and the LaRue case.

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# Liability of Plan Fiduciaries under ERISA: LaRue v. DeWolff, Boberg & Associates

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## Summary

In *LaRue v. DeWolff, Boberg & Associates*, a participant in a 401(k) plan requested that plan administrators change an investment in his individual account. The plan administrators failed to make this change, and the individual's account allegedly suffered losses. The participant brought an action against his former employer and the 401(k) plan, claiming the plan administrator breached his fiduciary duty by neglecting to properly follow the investment instructions. At issue in the *LaRue* case was whether an individual could bring an action under ERISA to recover the losses. The Supreme Court held that a plan participant in a 401(k) plan could sue a plan fiduciary under Section 502(a)(2) of ERISA to recover losses caused by a fiduciary breach that only affected his individual account. This report discusses breach of fiduciary duty claims under ERISA Section 502(a)(2) and the *LaRue* case, and will be updated as events warrant.

## Background

The Employee Retirement Income Security Act of 1974 (ERISA)[1] provides a comprehensive federal scheme for the regulation of private-sector employee benefit plans. One of the primary goals in enacting ERISA was to "protect ... the interests of participants and ... beneficiaries" of employee benefit plans, and assure that participants receive promised benefits from their employers.[2] To this end, ERISA "provid[es] for appropriate remedies, sanctions, and ready access to the Federal courts."[3] An integral part of

1 P.L. 93-406, 88 Stat. 829, (Sept. 2, 1974).

2 See ERISA § 2; 29 U.S.C. § 1001.

3 ERISA § 2(b); 29 U.S.C. § 1001(b). *See also Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (U.S. 2004).

ERISA's enforcement scheme is ERISA Section 502(a), which allows private parties as well as government entities to bring various civil actions to enforce provisions of ERISA.[4]

In general, ERISA regulates two types of pension plans, defined benefit plans and defined contribution plans.[5] A defined benefit plan is a plan under which an employee is promised a specified future benefit, traditionally an annuity beginning at retirement. In a defined benefit plan, the employer bears the investment risk and is responsible for any shortfalls.[6] By contrast, a defined contribution plan provides each participant with an individual account that accrues benefits based on amounts contributed to the account by both the employer and the employee.[7] The employee bears the investment risk, and thus the value of the account at the time of retirement is unknown. ERISA subjects both defined benefit and defined contribution plans to a number of requirements, including requirements for fiduciary responsibility.[8]

**Claims to Redress Breaches of Fiduciary Duty.** Section 502(a)(2) of ERISA authorizes the Secretary of Labor, a participant, a beneficiary, or a plan fiduciary to bring a civil action caused by a breach of fiduciary duty under Section 409 of ERISA. That section makes a plan fiduciary personally liable for breaches against an ERISA plan, and a breaching fiduciary must make good to the plan "any losses to the plan resulting from a breach" and restore to the plan any profits made from using the assets of the plan in improper ways.[9] It also subjects such a fiduciary to other relief as a court may deem appropriate, including removal of the fiduciary.

One controversial issue with respect to breach of fiduciary duty claims under ERISA is that while an individual plaintiff (*e.g.*, a plan participant) may bring a civil action under Section 502(a)(2), the Supreme Court has found that any recovery must "inure[] to the benefit of a plan as a whole."[10] In *Massachusetts Mutual Life Insurance Co. v. Russell*,[11] the Supreme Court ruled that a plan beneficiary could not bring a civil action for monetary damages against a plan fiduciary who had been responsible for the improper processing of a benefit claim. The plaintiff in *Russell*, who was disabled with a back ailment, alleged that she was injured when her employer's disability committee terminated her disability benefits. The Court rejected the beneficiary's claim, explaining ERISA Section 409 did not authorize a beneficiary to bring a claim against a fiduciary for monetary damages. Based on the text of Section 409 and the legislative history of ERISA, the Court opined

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[4] 29 U.S.C. § 1132(a).

[5] While not pertinent to this report, it should be noted that ERISA also regulates "employee welfare benefit plans." Welfare benefit plans include health plans, life insurance plans, and plans that provide dependent care assistance, educational assistance, or legal assistance. See 29 U.S.C. § 1002(1).

[6] *See* ERISA § 3(35), 29 U.S.C. § 1002(35).

[7] *See* ERISA § 3(34), 29 U.S.C. § 1002(34).

[8] ERISA § 401 *et. seq.*, 29 U.S.C. § 1101 *et. seq*.

[9] ERISA § 409, 29 U.S.C. § 1109.

[10] *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985).

[11] *Id.*

that relief for an individual beneficiary was not available under Section 409 based on the idea that a plaintiff could only recover losses on behalf of the entire plan.

## LaRue v. DeWolff, Boberg & Associates

In *LaRue*, the plaintiff, a participant in a 401(k) plan administered by his former employer, requested that plan administrators change an investment in his individual account. The plan administrators failed to make this change, and the individual's account allegedly suffered losses of approximately $150,000. LaRue brought an action against his former employer and the 401(k) plan, claiming the plan administrator breached his fiduciary duty by neglecting to properly follow the investment instructions.

LaRue brought a claim in district court under ERISA Section 502(a)(3), which permits a participant to bring a civil action to enjoin any act or practice which violates ERISA or the terms of the plan, or obtain "appropriate equitable relief" for these violations.[12] The participant argued that because the defendants failed to invest the money as he directed, his account was depleted and he was entitled to receive "make-whole" or "other equitable relief" under Section 502(a)(3).[13] The district court dismissed the participant's claims, holding that because the defendant did not possess any of the funds belonging to the participant, the relief the participant sought was monetary damages, and this remedy was not available to the plaintiff as "equitable relief" under Section 502(a)(3).

LaRue appealed the decision, arguing to the Fourth Circuit Court of Appeals that he should be able to recoup losses under both 502(a)(3) and 502(a)(2) of ERISA.[14] The court affirmed the district court's decision with regard to Section 502(a)(3), finding that the make-whole relief the participant sought could not be characterized as "equitable" relief. With regard to Section 502(a)(2), the court found that because the argument regarding Section 502(a)(2) was raised for the first time on appeal, the argument was waived. However, the court did discuss the merits of the Section 502(a)(2) claim. Relying on the *Russell* case, the Fourth Circuit held that LaRue's claim failed because Section 502(a)(2) provides remedies only for an entire plan, not for an individual's account. The court focused on the idea that the loss was personal to the defendant and was suffered by him alone. While the court acknowledged that the participant's plan account was indeed part of the "entire plan," the court found no basis to interpret the statute in this manner, and claimed that such an interpretation could undermine Congress's intent to limit the scope

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[12] Courts sometimes determine whether the relief a plaintiff seeks is legal or equitable. Colleen Murphy, *Money as a "Specific" Remed*y, 58 Ala. L. Rev. 119, 134 (2006). This distinction dates back to the "days of the divided bench," when England (and subsequently the United States) maintained separate courts of law and courts of equity. *See generally Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002). One important way these courts differed from each other was the remedies available to plaintiffs. Historically, the most common remedy in the courts of law was money. *Id.* at 135. The most common remedy in the courts of equity was an order for an individual to do something or refrain from doing something, such as with an injunction. *Id*. The scope of remedies available at law and at equity have been the subject of debate. While there is no longer this divided court system, courts may still evaluate a claim based on this dichotomy.

[13] *LaRue v. DeWolff, Boberg & Associates*, Civil Action No. 2:04-1747-18 (D.S.C. 2005).

[14] *LaRue v. DeWolff, Boberg & Associates*, 450 F.3d 570 (4th Cir. 2006).

of relief under ERISA. Given that the plaintiff sought to recover losses only for himself, the participant could not sue under Section 502(a)(2).

The Supreme Court rejected the Fourth Circuit's decision with respect to Section 502(a)(2), finding 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."[15] The Department of Labor, writing an amicus brief in *LaRue*, had argued for this result.[16] In explaining the holding, Justice Stevens, writing for the majority, distinguished *LaRue* from the *Russell* case in two ways. First, the Court explained that the type of fiduciary misconduct occurring in *LaRue* violated "principal statutory duties" imposed by ERISA that "relate to the proper plan management, administration, and investment of fund assets."[17] Conversely, in *Russell*, the fiduciary's breach (*i.e.*, a delay in processing a benefit claim) fell outside of these principal duties.[18]

Second, the Court found that in *Russell*, the emphasis placed on protecting the "entire plan" from fiduciary breach under Section 409 applies to defined benefit plans, which were the norm at the time of the case.[19] However, as the Supreme Court noted in *LaRue*, defined contribution plans are more popular today, and the "entire plan" language in *Russell* does not apply to these plans. The Court explained that for defined benefit plans, fiduciary misconduct would not affect an individual entitlement to a benefit unless the misconduct detrimentally affected the entire plan. By contrast, "for defined contribution plans ... fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive."[20] The Court went on to note that "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 kinds of harms that concerned the draftsmen of §409."[21]

Although all of the justices agreed on the outcome of the *LaRue* case, they disagreed as to the reasoning behind it. Chief Justice Roberts, joined by Justice Kennedy, wrote a concurring opinion suggesting that it is "at least arguable" that a claim such as the one made in *LaRue* should be evaluated not as a breach of fiduciary duty claim, but as a claim

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[15] *LaRue v. DeWolff, Boberg & Associates*, 2008 LEXIS 2014 at 14 (2008). The Court declined to address the section 502(a)(3) issue, due to the fact that the Court found that the court of appeals erred in its interpretation of section 502(a)(2). *Id.* at 5.

[16] Brief for the United States as Amicus Curiae, *LaRue v. DeWolff, Boberg & Associates*, 2008 LEXIS 2014 (2008) (No. 06-856).

[17] *Id.* at 9 (*quoting Russell*, 473 U.S. at 142).

[18] In addition, as the Court points out, unlike *LaRue*, the plaintiff in *Russell* received all the benefits to which she was entitled. 2008 LEXIS 2014 at 10 (2008).

[19] It is important to note that while the plan at issue in *Russell* was a disability plan rather than a defined benefit plan, the Court applied the logic in *Russell* to defined benefit plans. *See id.* at 12-13.

[20] *Id.* at 12.

[21] *Id.* at 13.

for benefits brought under Section 502(a)(1)(B) of ERISA.[22] Justice Roberts pointed to the fact that allowing a Section 502(a)(1)(B) action to be brought as a claim under Section 502(a)(2) could allow plaintiffs to circumvent certain protections that exist for plan administrators under Section 502(a)(1)(B). For example, as Justice Roberts pointed out, most courts recognize that before a plaintiff can bring a claim for benefits under Section 502(a)(1)(B), that a plaintiff has to exhaust the administrative remedies available under the plan before filing suit. The extra protections for a plan and its administrators, Justice Roberts explains, encourage employers and others to offer benefits to employees.

Justice Thomas, writing a separate concurrence joined by Justice Scalia, found the majority's reliance on "trends in the pension market" and the "concerns of ERISA's drafters" to be misplaced.[23] Justice Thomas concluded that the participant had a legitimate claim based on the "unambiguous text" of Sections 409 and 502(a)(2).[24] Justice Thomas articulated that losses to the participant's individual 401(k) account were losses to the plan, because assets in the participant's account were plan assets. A defined contribution plan, the Justice points out, is not a "collection of unrelated accounts."[25] These plans are "essentially the sum of [their] parts" and that losses to an individual account must be losses to the plan under ERISA.[26]

**Concluding Observations.** As has been pointed out, the *LaRue* case affirmed that individuals participating in defined contribution plans may bring a claim in the event that a plan fiduciary's inappropriate actions create losses to an individual's account.[27] While some commentators praised the *LaRue* decision for offering protection to individuals in 401(k) plans, others have suggested that the case will likely lead to an increase in litigation of claims by 401(k) participants who have suffered individual account losses.[28] One question arising from the *LaRue* decision is the implications of Justice Roberts's concurrence. Courts may be faced with the issue of whether the availability of relief under Section 502(a)(1)(B) affects a participant's ability to bring a claim under Section 502(a)(2).[29] Another question is whether, under Section 502(a)(2), a participant is required to exhaust administrative remedies provided by a plan before

[22] Section 502(a)(1)(B)of ERISA authorizes a plaintiff (*i.e.*, a participant or a beneficiary in an ERISA plan) to bring an action against the plan to recover benefits under the terms of the plan that have been wrongfully denied to a participant.

[23] *Id.* at 22 (Thomas, J. concurring).

[24] *Id.*

[25] 2008 LEXIS 2014 at 24 (2008)(Thomas, J. concurring).

[26] *Id.* at 25.

[27] See Michael R. Triplett and Meredith Z. Maresca, *Unanimous Supreme Court Rules Individual Participant Has Section 502(a)(2) Remedy*, Pension and Benefits Daily Vol. 8, No. 34 (Feb. 21, 2008).

[28] *Id.*

[29] *LaRue v. DeWolff, Boberg & Assocs.*, 2008 U.S. LEXIS 2014 at 20 (2008)(Roberts, J. concurring).

filing suit. This question was raised in a footnote in the majority opinion, but was not answered by the Court.[30]



[30] *LaRue v. DeWolff, Boberg & Assocs*., 2008 U.S. LEXIS 2014 at 8 n.3 (2008).