



The Supreme Court's Decision in *LaRue*: ERISA Litigation and Insurance Implications

On February 19, 2008, the United States Supreme Court ruled in *LaRue v. DeWolff*, 552 U.S. ___ (2008), that individual participants in defined contribution plans may bring breach of fiduciary duty claims under ERISA for losses to their individual account. While the decision paves the way for a greater number of individual fiduciary lawsuits, it is not likely to have much, if any, impact on the more troublesome fiduciary class action claims.

A. Background and Decision

The plaintiff in *LaRue* was a participant in his company's 401(k) plan. He alleged that the plan administrators breached their fiduciary duties by failing to follow his investment instructions, and he sought to recover the resulting \$150,000 in losses to his account. Because the provision under which the petitioner sought relief, ERISA §502(a)(3), is limited to "appropriate equitable relief," as opposed to monetary damages, the district court dismissed plaintiff's claim. On appeal, the plaintiff asserted that, in addition to his claim under ERISA §502(a)(3), he could recover under §502(a)(2) of ERISA. That Section gives plan participants, beneficiaries, and fiduciaries a private right of action to enforce the provisions of ERISA §409, which imposes liability upon fiduciaries who breach any of the responsibilities, obligations, or duties under ERISA. In particular, §409(a) provides that a fiduciary shall be personally liable to "make good to such plan any losses *to the plan* resulting from such breach . . ." (Emphasis added). The narrow issue considered by the Supreme Court was whether a participant's individualized losses constituted "losses to the plan" so as to give the plaintiff a potential right of recovery under §502(a)(2). The Court concluded that they did.

In reaching its decision, the Court distinguished defined contribution plans, like the 401(k) retirement plan in that case, from defined benefit plans. The Supreme Court previously held in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), that a participant in a defined benefit plan could not bring a lawsuit under §502(a)(2) to recover consequential damages arising out of a delay in processing her claim. According to the Court in *Russell*, recovery under §502(a)(2) must "inure[] to the benefit of the plan *as a whole*." *Id.* at 140 (Emphasis added). Although the *LaRue* court did not disturb that holding in the context of a defined benefit plan, it refused to apply it to defined contribution plans. According to the Court, misconduct by fiduciaries of a defined benefit plan does not affect a particular participant's entitlement to a defined benefit unless the misconduct threatens the existence of the plan itself. By contrast, a fiduciary's misconduct under a defined contribution plan

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“need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive.” As such, the Court held that, in the context of a defined contribution plan, it did not matter “[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.”

The Court remanded the case to the district court to decide the merits of the plaintiff’s claim. In doing so, the Court specifically noted that it did not address whether the plaintiff’s investment directions were made in accordance with the plan’s requirements, whether he was required to exhaust administrative remedies under the plan before seeking relief under §502(a)(2), or whether his claims were filed in a timely manner.

B. The Potential Impact

The following summarizes some of the implications for fiduciaries and their insurers arising from the *LaRue* decision.

1. More Fiduciary Claims

Because *LaRue* gives individuals the ability to pursue claims for monetary damages, one would assume a greater number of civil lawsuits will be filed in the future under ERISA. But, that may or may not occur. Even before *LaRue*, individual plan participants had the ability under ERISA §502(a)(1)(B) to seek relief for “benefits due” under the terms of their plan or to clarify their rights under the plan. However, claims for benefits under that provision generally are subject to an administrative review process and nearly all courts have recognized that a plan participant’s administrative remedies must be exhausted before the participant may pursue their claims in court.

Now, individual participants can bring claim directly under §502(a)(2). It is unclear, though, whether a plaintiff must comply with the administrative review process when bringing a §502(a)(2) claim. If such compliance is required, *LaRue* may not materially increase the number of civil lawsuits against fiduciaries, because such a claim would be largely the same as a §502(a)(1)(B) claim, which has been available for years.

The Court in *LaRue* specifically declined to opine whether a plaintiff is “required to exhaust remedies set forth in the Plan before seeking relief in federal court pursuant to §502(a)(2).” If lower courts determine such administrative steps are not necessary in order to bring a claim in federal court, an upsurge of new fiduciary litigation is likely.

While most individual claims under §502(a)(2) will probably involve relatively low potential damages, the costs and expenses of defending each claim could be significant. Moreover, the number of lawsuits filed against any insured may begin to resemble the claims experience observed in the employment context. From a fiduciary liability insurance perspective, that increased frequency may require insurers to increase their claims-handling capacity and may prompt insurers to reevaluate the appropriate self-insured retention applicable to each claim.

2. Benefits Due Exclusion

In most cases, a breach of fiduciary claim brought under ERISA §502(a)(2) by a plan participant as a result of *LaRue* will not likely involve unpaid “benefits” in a traditional sense. Rather, most

individual §502(a)(2) claims, like the plaintiff's claim in *LaRue*, will likely be for investment losses, lost earnings, excessive costs, or other wrongful erosion of the plaintiff's account balance.

In a concurring opinion in *LaRue*, Chief Justice Roberts opines that the petitioner's investment losses constitute "benefits due" and, therefore, should be recoverable under §502(a)(1)(B) without regard to §502(a)(2). According to Roberts, the petitioner "seeks the benefits that would otherwise be due him if, as alleged, the plan carried out his investment instructions. LaRue's claim, therefore, is a claim for benefits that turns on the application and interpretation of plan terms, specifically those governing investment options and how to exercise them." Roberts concludes that, because the plaintiff has a viable claim for relief under §502(a)(1)(B),^[1] the plaintiff should not also have a right to bring his claim under §502(a)(2). Given that the Court's majority specifically allowed the plaintiff to pursue his claim under §502(a)(2), the Court's decision could be read as a rebuke of the Chief Justice's contention that the plaintiff's claim constitutes a claim for "benefits due."

However, Justice Roberts' expansive interpretation of "benefits due" is consistent with several other recent Court of Appeals' decisions, and suggests that the "benefits due" exclusion in nearly all fiduciary liability policies could be applied more broadly than it has historically. *See, e.g., Harzewski v. Guidant Corp.*, 489 F.3d 799, 807 (7th Cir. 2007) ("Benefits are benefits; in a defined-contribution plan they are the value of the retirement account when the employee retires, and a breach of fiduciary duty that diminishes that value gives rise to a claim for benefits measured by the difference between what the retirement account was worth when the employee retired and cashed it out and what it would have been worth then had it not been for the breach of fiduciary duty."); *Graden v. Conexant Sys. Inc.*, 496 F.3d 291 (3d Cir. 2007). To address that concern, some insurers now offer an "Investment Loss Coverage" endorsement that purports to carve-out of the "benefits due" exclusion these types of investment loss claims.

3. Class Certification

In the class action context, plan participants generally have been successful in maintaining class action lawsuits on behalf of a plan, even where the relief sought was intended to benefit only some of the plan participants. For instance, over the last several years, numerous so-called tag-along securities class action lawsuits have been filed and litigated under ERISA by and on behalf of participants in a company's 401(k) plan who invested in a fund comprised of company stock. Although those cases do not necessarily benefit plan participants who did not invest in the company stock fund, most courts have held that the lawsuits nevertheless may proceed as class actions under §502(a)(2). *See, e.g., In re Schering Plough ERISA Litigation*, 420 F.3d 231 (3d Cir. 2005); *Milofsky v. American Airlines, Inc.*, 442 F.3d 315 (5th Cir. 2006) ("Plaintiffs, a subset of participants in the Super Saver-A 401(k) Capital Accumulation Plan for Employees of Participating AMR Corporation Subsidiaries, are entitled to further development of their breach of fiduciary duties claims, brought under ERISA sections 502(a)(2) and 409(a) . . ."). Accordingly, *LaRue* is not likely to have a meaningful affect on the frequency or success of such tag-along securities class actions.

C. Summary

Whether the Supreme Court's decision in *LaRue* ultimately will result in a significant increase in individual plan participant claims will probably depend on whether courts require plan participants to first comply with the plan's administrative review process before initiating their §502(a)(2) claims in federal court. In the

near term, though, a significant increase in claim activity is likely while courts address those issues. Perhaps, more importantly, the *LaRue* decision does not appear to broaden the scope or nature of class action claims brought under ERISA.

In other words, high severity claims are probably unaffected by this new decision, but low severity claims will probably increase in frequency, at least in the near term.

[1] Citing *Hess v. Reg-Ellen Machine Tool Corp.*, 423 F.3d 653 (7th Cir. 2005), Roberts writes that plan participants have in the past filed lawsuits under §502(a)(1)(B) alleging similar benefit denials in violation of plan terms. The claimants in *Hess* sought relief under §502(a)(1)(B) for a plan administrator's alleged failure to move retirement funds pursuant to participants' investment instructions, resulting in losses in their accounts. However, because the trial court dismissed the participants' claims on summary judgment and the Seventh Circuit affirmed that decision on appeal, neither court addressed whether those type of investment losses constituted "benefits" or whether a claim for investment losses was otherwise appropriate under §502(a)(1)(B).

The material in this outline is not intended to provide legal advise as to any of the subjects mentioned but is presented for general information only. Readers should consult knowledgeable legal counsel as to any legal questions they may have.