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Supreme Court Permits Participant to Sue Under ERISA Fiduciary Rules for Losses Sustained in Individual 401(k) Plan Account

On February 20, 2008, in its long-awaited opinion in *LaRue v. DeWolff*, No. 06-856, the U.S. Supreme Court held that an individual participant could sue for losses sustained in his account under his employer's 401(k) plan. This ruling overturned a decision by the U.S. Court of Appeals for the Fourth Circuit that had held that a suit for breach of fiduciary duty under ERISA could only be brought at the plan level, rather than by an individual participant.

ERISA Background

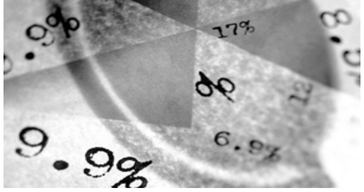
Section 502(a) of ERISA enumerates various types of suits that participants may bring to enforce their rights under a benefit plan. The principal causes of action are set forth under sections 502(a)(1), 502(a)(2) and 502(a)(3), which allow a participant, respectively:

1) to recover benefits due to him under the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

2) to obtain appropriate relief under section 409 of ERISA, which makes a plan fiduciary personally liable to make good to a plan for losses to the plan resulting from a breach of fiduciary duties imposed under ERISA; and

3) to obtain appropriate equitable relief to redress violations of ERISA or to enforce rights under ERISA.

In 1985, in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), the U.S. Supreme Court held that a participant could not bring suit under section 502(a)(2) for individual losses resulting from a fiduciary's breach of duty. In the Court's view, sections 502(a)(2) and 409 "protect the entire plan, rather than the rights of an individual beneficiary." The *Russell* decision has long been relied upon to reject suits brought under section 502(a)(2) by individual participants (other than those acting a representatives for similarly situated participants). In fact, the lower courts in the *LaRue* case did just that.



The Supreme Court's Ruling in *LaRue*

In *LaRue*, the Supreme Court unanimously reversed the Fourth Circuit's decision that LaRue could not sue under section 502(a)(2) or 502(a)(3). (Actually, the *LaRue* opinion only addresses the section 502(a)(2) issue, because the Court determined it was not necessary to address the section 502(a)(3) issue to overturn the lower court's decision.)

The majority opinion, written by Justice Stevens, distinguished *Russell* by differentiating between the type of plan involved in that case and the type of plan at issue in the *LaRue* case. In *Russell*, the plaintiff sued for consequential damages resulting from a delay in paying her the benefits to which she was entitled under a disability plan. In the Supreme Court's view, Russell received all of the benefits to which she was entitled, and, more importantly, the plan itself was not harmed (as would be required for there to be liability under section 409 and, hence, a cause of action under section 502(a)(2)). A disability plan—as well as the traditional "defined benefit" pension plan—promises a participant a specified benefit amount. Thus, according to the Court, misconduct by a plan fiduciary does not affect an individual participant's entitlement to that defined benefit "unless it creates or enhances the risk of default by the entire plan."

In contrast, *LaRue* involved a "defined contribution" retirement plan, under which a participant is entitled to the amount credited to his account in accordance with the terms of the plan. The Court reasoned that, because under such a plan "fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive[,]" "fiduciary misconduct" that does not affect the "entire plan" nevertheless "creates the kind of harms that concerned the draftsmen of §409." The Court also took into account that defined benefit plans were the most common type of retirement plan at the time of the *Russell* decision, while most retirement benefits are provided today under defined contribution plans, and concluded that the references in *Russell* to harm to the "entire plan," on which the Fourth Circuit based its holding in *LaRue*, "are beside the point in the defined contribution context."

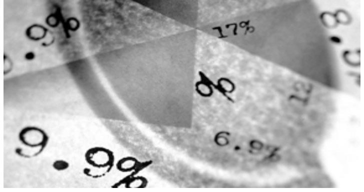
A concurring opinion written by Justice Thomas reached much the same conclusion, but more directly and in a manner that arguably would have a broader impact. According to Justice Thomas, section 409 refers to losses "to the plan," not to an "entire plan." Because the fiduciary misconduct at issue in *LaRue* involved the alleged improper investment of plan assets, that misconduct created a loss not just to the individual participant but "to the plan" as well, and, therefore, a participant is entitled to seek relief from that fiduciary misconduct under section 502(a)(2).

A second concurring opinion, authored by Chief Justice Roberts, leaves open the possibility that a participant cannot bring suit under section 502(a)(2) if he could have sued under section 502(a)(1), which was an issue not squarely before the Court in the *LaRue* case.

Potential Import of the *LaRue* Decision

Only time and future litigation will tell exactly what impact the *LaRue* decision will have on 401(k) plan litigation. As noted in the Chief Justice's concurring opinion, a claim of the type brought by LaRue under section 502(a)(2) may also form the basis for a claim for benefits under section 502(a)(1). In addition, the remedy available to LaRue under section 502(a)(2) is likely to be the same relief that would be available under section 502(a)(1). Thus, the *LaRue* decision does not create a cause of action or a remedy that did not exist previously. Because, however, there are two fundamental differences between actions under section 502(a)(1) and section 502(a)(2) — i.e., (1) a participant must exhaust a plan's administrative remedies before bringing suit under section 502(a)(1), and (2) the standard of review in a section 502(a)(1) case is generally whether the plan fiduciary engaged in an abuse of discretion — the *LaRue* decision could result in suits being brought under section 502(a)(2) at times or under circumstances under which a claim under section 502(a)(1) would be barred. The Chief Justice's concurring opinion leaves open the question of whether such a result could occur, as does a footnote in the majority opinion, and we expect that this question will be the subject of considerable litigation in the future.

What is very clear from the *LaRue* case is the fact that litigation over losses in 401(k) plans is very much at the forefront of the minds of plan participants and plaintiffs' attorneys. Accordingly, this case should serve as a reminder to employers, plan administrators, trustees and other parties serving in a fiduciary capacity with respect to an ERISA-covered plan of the importance of establishing rigorous administrative policies and procedures, and monitoring plan operations for compliance with those policies and procedures, to lessen the likelihood that a claim can be brought.



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