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# 'LaRue' lets individuals sue plans

## High court ruled that ERISA allows suits for fiduciary breaches that decrease account assets.

By Karla Grossenbacher
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THE U.S. SUPREME COURT made pension history on Feb. 20 with its decision in *LaRue v. DeWolff, Boberg & Associates Inc.*, 128 S. Ct. 1020 (2008). In *LaRue*, the high court held that § 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(2), authorizes a participant in a defined contribution plan, such as a 401(k) plan, to recover money damages for fiduciary breaches that decrease the plan assets in his or her individual account. Prior to *LaRue*, many employees (and their lawyers) had assumed that an individual had to be seeking relief on behalf of the entire plan at issue—not just on behalf of his or her own interest in the plan—in order to obtain monetary relief under § 502(a)(2), which allows a participant to sue plan fiduciaries for breaching their fiduciary duties.

The concept of losses that affect the "entire plan," however, does not fit neatly within the structure of a defined contribution plan, which is a plan made up of individual accounts over which individual participants can exercise control. As the Supreme Court noted in *LaRue*, "defined contribution plans dominate the retirement plan scene today." 128 S. Ct. at 1025. They have largely replaced traditional pension plans, known as defined benefit plans, which provide a monthly benefit to participants upon retirement based on factors such as tenure and salary.

Employers and benefit plan administrators, as well as those who insure them, fear that the decision in *LaRue* will result in an onslaught of lawsuits by individual participants in defined contribution plans that will prove quite costly to defend. This could have the undesirable effect of causing employers to stop sponsoring pension plans (and perhaps other kinds of plans) and putting at risk the ability of the average American to save for retirement.

It all started, allegedly, with a simple failure to follow instructions. James LaRue, formerly an employee of DeWolff, Boberg & Associates Inc. and a participant in DeWolff's 401(k) plan, claimed that he instructed DeWolff to invest his money and contributions in a certain way in 2001 and 2002. According to LaRue, DeWolff breached its fiduciary duty to him by not investing his money as instructed, and as a result, his account failed to increase in value by an estimated $150,000. LaRue sought make-whole or other equitable relief under § 502(a)(3) of ERISA, which allows participants in employee benefits plans to obtain "appropriate equitable relief...to redress such violations or...to enforce any provisions of this subchapter or the terms of the plan," as well as any other relief the court deemed just and proper.

Notably, LaRue's complaint did not mention § 502(a)(2) of ERISA, and when DeWolff and the plan filed a motion for judgment on the pleadings on LaRue's claim, the only section of ERISA relied upon by the parties in their briefs before the district court was § 502(a)(3). This is not a distinction without a difference because *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), held that the term "equitable relief" in § 502(a)(3) did not include requests for "legal" relief, such as monetary damages. Thus, DeWolff successfully argued before the district court that LaRue was really seeking monetary damages in the form of restitution (i.e., reimbursement of the losses to his account), which were not recoverable under 502(a)(3). On this basis, the district court dismissed LaRue's breach of fiduciary duty claim.

*Karla Grossenbacher is the chairwoman of the labor and employment practice in the Washington office of Seyfarth Shaw. She represents employers, plans and fiduciaries in ERISA litigation matters. The firm authored an amicus brief on behalf of the U.S. Chamber of Commerce and the Financial Services Roundtable in the* LaRue *case.*

It was on appeal to the 4th U.S. Circuit Court of Appeals that LaRue argued for the first time that he was seeking recovery under § 502(a)(2), as well as § 502(a)(3). After affirming the district court's dismissal of LaRue's § 502(a)(3) claim, the 4th Circuit also rejected his argument for recovery under § 502(a)(2). In so doing, it relied almost exclusively on language from *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). In *Russell*, the high court stated that § 502(a)(2) protects "the entire plan, rather than the rights of an individual beneficiary" and therefore relief sought under this section must "inure to the benefit of the plan as a whole." Id. at 140. Relying on this language, the 4th Circuit held that LaRue's § 502(a)(2) claim failed because he sought a "personal" remedy that would result in a recovery "paid into his plan account [which] exists specifically for his benefit." 450 F.3d 5701, 571-74 (4th Cir. 2006).

On writ of certiorari, the Supreme Court held that LaRue could maintain a claim for breach of fiduciary duty under § 502(a)(2). The court said that the 4th Circuit had taken the "entire plan" language from *Russell* out of context. Writing for the majority, Justice John Paul Stevens, who had also authored the majority opinion in *Russell*, explained that the statement in *Russell* about § 502(a)(2) protecting the "entire plan" was written in reference to the defined benefit welfare plan at issue in that case and was irrelevant in the context of a defined contribution plan in which "the fiduciary misconduct need not threaten the solvency of the entire plan." Id. at 1025. The majority also pointed out that § 404(c) of ERISA, which immunizes fiduciaries of defined contribution plans from liability for losses caused by a participant's "exercise of control over the assets in his account," would serve no purpose if a fiduciary could not otherwise be sued for breaches that result in losses to an individual's account.

DeWolff and the amici that supported its position had argued that allowing claims for losses to individual accounts under § 502(a)(2) would add a remedy to ERISA's complex and carefully balanced remedial scheme that Congress did not intend. This, in turn, would disturb the delicate balance struck by Congress in ERISA between protecting pension plan participants from losses caused by fiduciary breach and encouraging employers to form pension plans. In addition, they predicted that, if the Supreme Court allowed individuals to recover money damages from fiduciaries under § 502(a)(2) for losses to their individual accounts, the amount of ERISA litigation faced by plans and plan administrators would skyrocket, increasing both litigation and insurance costs, and causing employers to rethink sponsoring pension plans.

**Court held 'entire plan' ruling to be irrelevant to 401(k)s.**

And indeed, the first signs of the proliferation of *LaRue*-type claims have already appeared. A U.S. district court in California recently granted a motion filed by plaintiffs in a class action for leave to add a request for money damages to the § 502(a)(2) claim already set forth in their complaint. *Barcia v. Contain-A-Way*, No. 07-938-IEG-JMA, 2008 U.S. Dist. Lexis 27365 (S.D. Calif. April 1, 2008). The complaint, which was filed before the high court's *LaRue* decision, had requested only injunctive and declaratory relief.

### Defenses to 'LaRue'-type claims

There is some doubt, however, as to whether these new claims ultimately will prove meritorious. The Supreme Court did not express any opinion on the merits of LaRue's claim. DeWolff and others facing *LaRue*-type claims under § 502(a)(2) have a number of procedural and substantive defenses available to them.

For example, DeWolff can argue that LaRue should be required to proceed under § 502(a)(1)(B) of ERISA, which allows a participant to "recover benefits due to him under the terms of his 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." In a very real sense, LaRue is seeking to recover the benefits (i.e., his account balance) that would have been owed him under the plan had his investment instructions been followed. Thus, it can be argued that his § 502(a)(2) claim is merely a claim for benefits dressed up like a breach of fiduciary duty claim.

The significance of treating *LaRue*-type claims as benefit claims under § 502(a)(1)(B) is that most courts require an individual first to exhaust his or her administrative remedies by following the plan's internal claims procedures before bringing such a claim in court. See, e.g., *Communication Workers of America v. AT&T*, 40 F.3d 426 (D.C. Cir. 1994) (collecting cases). Requiring a participant to pursue the plan's internal claims procedure gives the plan administrator, in the first instance, the opportunity to interpret the terms of the plan and dispose of the individual's claim.

Moreover, when the plan administrator has been granted sufficient discretion under the terms of the plan, courts considering a § 502(a)(1)(B) claim will review the plan administrator's decision under a deferential "abuse of discretion" standard based on the administrative record that was before the plan administrator without allowing the parties to conduct further discovery in litigation. See *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989). Chief Justice John G. Roberts Jr. underscored in his concurring opinion in *LaRue* that the majority

opinion had not addressed or considered whether LaRue's 502(a)(2) claim should be treated as a claim for benefits under 502(a)(1)(B).

DeWolff could also argue that LaRue should be required to exhaust his administrative remedies before proceeding with his 502(a)(2) claim. There is now a split among the circuits as to whether the administrative-exhaustion requirement applies to statutory claims like those under 502(a)(2). See *AMA v. United Healthcare Corp.*, No. 00-2800, 2007 U.S. Dist. Lexis 44196 (S.D.N.Y. June 15, 2007) (noting split and collecting cases).

Moreover, if LaRue does have a viable § 502(a)(1)(B) claim, DeWolff could argue that he is barred from maintaining a claim under § 502(a)(2) under *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996), which held that relief would not be "appropriate" under § 502(a)(3) if an adequate remedy were provided elsewhere in § 502(a). If those bringing *LaRue*-type claims were forced to proceed against the plan under § 502(a)(1)(B) and simultaneously barred from proceeding against the fiduciary responsible for the loss under § 502(a)(2), this could seriously affect their ability to obtain a recovery. For example, if LaRue were to file an administrative claim against the plan for benefits, and the plan were to agree he was entitled to such benefits, how would it pay LaRue? The plan would ostensibly have to choose between raiding the accounts of other participants or suing the fiduciary to obtain the funds. And if the plan chose not to sue the fiduciary, which often would be the plan fiduciaries suing themselves or the employer sponsor, and LaRue could not sue the fiduciary himself under § 502(a)(2), he might be saddled with a pyrrhic victory under § 502(a)(1)(B).

The availability of these procedural defenses underscores the need for employers and plan administrators to ensure that the required administrative claims procedures are in place under their employee benefits plans and that employees have proper notice of them. It is also critical that the plan administrator be granted sufficient discretion under the terms of the plan to interpret its provisions so that his or her decision will be reviewed under the deferential *Firestone* standard. Also, when a *LaRue*-type claim surfaces, the prudent employer or plan administrator will steer the participant or beneficiary raising such an issue to the plan's administrative claims procedures.

**Parties litigating 'LaRue' type claims face factual issues.**

There are also a host of factual issues that must be confronted by parties litigating *LaRue*-type claims. First and foremost, the plaintiff must establish that a fiduciary breach took place. Given the procedural posture of the *LaRue* case, the Supreme Court, and the lower courts before it, assumed that a fiduciary breach had taken place as alleged in the complaint. On remand, LaRue still will have to prove that he actually gave the investment instructions as alleged in his complaint, that he did so in conformance with the terms of the plan and that his instructions were not followed. He will also have to prove that the individuals responsible for the failure to follow his instructions were fiduciaries acting in a fiduciary capacity.

There also is the question of causation. If an employer or other fiduciary can prove that the losses complained of by the participant were not the result of an act taken by the fiduciary, but rather an act taken by the participant, then they should be able to find safe harbor under ERISA § 404(c). Section 404(c) shields fiduciaries from liability for losses in defined contribution plans caused by a participant's exercise of control over the assets in his or her account. DeWolff asserted in its answer that LaRue had rescinded at least one of the instructions he claimed to have given. If this is true and the losses to LaRue's account occurred as a result of his own actions (i.e., rescinding his instructions), then DeWolff can argue that it has no liability to LaRue under § 404(c).

Although the Supreme Court answered the question of whether LaRue could assert a claim under § 502(a)(2) of ERISA for losses to his individual account in a defined contribution plan, it left many questions unanswered. As *LaRue*-type claims are asserted in the coming months and years, the effect of this landmark decision on the ability of the American worker to save and plan for retirement will become clear. Were DeWolff and its amici simply crying wolf? Only time will tell, but the better prepared employers and fiduciaries are to defend against *LaRue*-type claims, the less chance there is that the defined contribution plan will go the way of the dinosaur, like defined benefit plans. NLJ

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