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Featured Article

Fiduciary Responsibility

ERISA Stock-Drop and Fiduciary Breach Litigation Post-*LaRue*

Article contributed by
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The Supreme Court's recent decision in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 128 S. Ct. 1020, [2008 BL 32192](#) (2008), addressed the first—but only the first — of several issues that have divided the lower courts in “stock drop” cases under the Employee Retirement Income Security Act (ERISA), [29 U.S.C. § 1001](#) *et seq.* These are lawsuits that follow a significant downturn in a company's stock and typically charge that plan fiduciaries breached their responsibilities by retaining the stock as an investment option in the corporate 401(k) plan, or by failing to warn plan participants of increased risks associated with the stock.

Although *LaRue* itself was not a stock-drop case, it is among the Court's first decisions involving a 401(k) plan, and the divergent approaches suggested by the Justices—and their readiness to articulate a different rule for defined contribution plans than for defined benefit plans—reflect the numerous uncertainties that continue to surround 401(k) fiduciary breach litigation as those cases wend their way through the federal district and appellate courts.

LaRue in the Lower Courts

James LaRue had been a participant in the 401(k) plan sponsored by his employer, DeWolff, Boberg & Associates (DeWolff). LaRue filed a suit against DeWolff and its plan alleging that he had directed the company to make certain changes to the investments in his account, but it had failed to do so; this resulted in a \$150,000 loss, he said, which he sought to recover. *Id.* at 1022–23. LaRue originally brought suit under ERISA § 502(a)(3), [29 U.S.C. § 1132\(a\)\(3\)](#), which provides only for equitable relief; the district court concluded that the relief LaRue sought was legal in nature, and dismissed the case. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, No. 04-CV-1747 (Memo. Op. June 23, 2005).

On appeal, LaRue argued that he had a valid claim not only under ERISA § 502(a)(3), but also under ERISA

§ 502(a)(2), which provides legal and equitable relief on behalf of the plan. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, [450 F.3d 570](#), 573–74 (4th Cir. 2006). Although arguments raised for the first time on appeal are ordinarily deemed waived—and left unaddressed—the Fourth Circuit reached the merits of LaRue’s ERISA § 502(a)(2) claim and ruled that claims under ERISA § 502(a)(2) must “inure[] to the benefit of the plan *as a whole*,” not to particular persons with rights under the plan.” *Id.* at 573, quoting and relying upon *Massachusetts Mutual Life Insurance Co. v. Russell*, [473 U.S. 134](#), 140 (1985). Because LaRue sought relief for his own account and no other, the court determined he could not proceed under ERISA § 502(a)(2). The court also rejected LaRue’s ERISA § 502(a)(3) claim, agreeing with the district court that the monetary relief requested exceeded the “equitable relief” permitted by that section. *Id.* at 575–76.

The Supreme Court’s Decision

In a February 20, 2008 opinion by Justice Stevens, the Supreme Court vacated and remanded. *LaRue*, 128 S. Ct. at 1026. An individual can recover under ERISA § 502(a)(2) for “fiduciary breaches that impair the value of plan assets in a participant’s individual account,” Justice Stevens wrote. *Id.* The Court rejected the Fourth Circuit’s reliance on *Russell*: It is true, the Court acknowledged, that *Russell* had referred to the necessity of injury to “the entire plan, rather than [to] the rights of an individual beneficiary,” but the Court distinguished the case on the ground that it involved a defined benefit plan. *Id.* at 1025 (quoting *Russell*, 473 U.S. at 142). *LaRue* involved a defined contribution plan, which the Court observed “dominate the retirement plan scene today.” *Id.* The language from the earlier decision simply “does not apply to defined contribution plans,” the Court stated. *Id.*

Justice Thomas, joined by Justice Scalia, concurred in the judgment. Rather than distinguishing *Russell*, Justice Thomas would have harmonized the cases by finding that losses to individual 401(k) accounts are in effect losses to the “entire plan” within the meaning of the Court’s earlier decision, and therefore a separate principle for defined contribution plans need not be articulated. *Id.* at 1029 (Thomas, J., concurring in the judgment). “Because a defined contribution plan is essentially the sum of its parts, losses attributable to the account of an individual participant are necessarily ‘losses to the plan,’” Justice Thomas explained. *Id.* Justice Thomas added that the interpretation of ERISA § 502(a)(2) should not depend on “trends in the pension plan market”—a reference to the majority’s reliance on the shift from defined benefit pension plans to defined contribution plans to explain its departure from *Russell*. *Id.* at 1025 (maj. op.).

Chief Justice Roberts, joined by Justice Kennedy, concurred in part and in the judgment, suggesting that individuals seeking relief for losses to their individual accounts may

be required to proceed under ERISA § 502(a)(1)(B) (for “benefits due . . . under the terms of the plan”), rather than under ERISA § 502(a)(2) as indicated by the seven other Justices. *Id.* at 1026 (Roberts, C.J., concurring in part and in the judgment). The distinction is important because ERISA § 502(a)(1)(B) requires claimants to exhaust administrative remedies available under the plan, and a plan’s denial of a participant’s claim may be reviewed deferentially by the courts. The Chief Justice’s suggestion was not directly addressed in the majority opinion, although in a footnote the majority suggested that a plaintiff’s ERISA § 502(a)(2) claim could carry a requirement to exhaust administrative remedies. *Id.* at 1024 n.3 (maj. op.).

What Next?

LaRue is among the Supreme Court’s first cases involving a defined contribution plan. The Court’s opinion reflects an appreciation for the sometimes critical differences between those plans and the defined benefit plans that have been the principal subject of the Court’s decisions on ERISA fiduciary duties to date. Precisely because of those differences, however—and because the Court recognized that they may sometimes require a different approach than in cases involving defined contribution plans—*LaRue* serves primarily to highlight the numerous important unresolved questions in 401(k) fiduciary breach litigation.

Two of the more important outstanding questions were presented in *LaRue* itself, but were deferred by the Court for another day. One is the relief available from fiduciaries under ERISA § 502(a)(3). A “suit against a fiduciary to recover losses resulting from a breach of fiduciary duty” should be considered a claim for equitable relief under ERISA § 502(a)(3), the government had argued in urging the Court to address the issue in *LaRue*. See Brief for the United States as Amicus Curiae Supporting Petitioner, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, [No. 06-856](#) (2008). The Solicitor General noted that the Fourth Circuit’s ruling to the contrary was consistent with decisions of the Sixth, Eighth, Ninth, and Tenth Circuits, but was in tension with the Seventh Circuit’s decision in *Bowerman v. Wal-Mart Stores, Inc.*, [226 F.3d 574](#), 572 (7th Cir. 2000). See Brief for the United States as Amicus Curiae in Support of the Petition for a Writ of Certiorari, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, [No. 06-856](#) (2008).

While this important question continues to be litigated in the lower courts, the Supreme Court recently telegraphed that it may address it in a pending petition to review the Fifth Circuit’s decision in *Amschwand v. Spherion Corp.*, [505 F.3d 342](#) (5th Cir. 2007). In that case, the Fifth Circuit considered whether a remedy that was otherwise legal in nature, and therefore unavailable under ERISA § 502(a)(3), was rendered equitable in nature—and therefore available under ERISA § 502(a)(3)—if the relief was sought from a fiduciary. *Id.* at 346–47 (discussing

plaintiff's argument that make-whole relief "was routinely available as a remedy for breach of fiduciary duty in cases brought against fiduciaries"). The Fifth Circuit found that under *Great-West Life & Annuity Ins. Co. v. Knudson*, [534 U.S. 204](#) (2002), it is "only the nature of the claim and the relief sought—not the status of the litigants—[that] determine[s] the scope of available § 502(a)(3) recovery." *Id.* at 347. On March 3, the Court invited the Solicitor General to file a brief addressing whether the Court should grant review in the case. See *Amschwand v. Spherion Corp.*, [No. 07-841](#) (U.S. Mar. 3, 2008). If the Court decides to hear the case, it is likely to provide an answer to the important question of whether compensatory monetary relief is equitable in nature when sought from a fiduciary.

A second issue not conclusively resolved in *LaRue* is the standing of former participants to sue for losses that occurred to their accounts before they exited the plan. After the Supreme Court granted review in *LaRue*, the defendants filed papers in the Court stating that they recently had learned that *LaRue* was no longer a participant in the plan and accordingly, they argued, the case was moot and should be dismissed because *LaRue* lacked standing to sue. The Court addressed this claim in an ambiguous footnote, stating: "the case is not moot. A plan 'participant' . . . may include a former employee with a colorable claim for benefits." *Id.* at 1026 n.6 (emphasis added). The footnote cited a Seventh Circuit decision by Judge Posner holding that former participants could sue in stock drop cases, but in using the term "may" the Court stopped short of conclusively resolving the question. Consistent with this, on March 3 the Court denied *certiorari* in *Graden v. Conexant Sys.*, [496 F.3d 291](#) (3d Cir. 2007), *cert den.* [No. 07-750](#) (U.S., Mar. 3, 2008), where the Third Circuit permitted former participants to proceed with their stock drop case in the belief that they could "become eligible to receive" benefits if the employer was forced to make good the loss to the plan. *Id.* at 296. Meanwhile, after *LaRue* was decided, the Fourth Circuit requested further briefing in another case, *Wangberger v. Janus Capital Group Inc.*, [Nos. 06-2003\(L\), 06-2175, 06-2176, 06-2177](#), that presents the question of whether a former participant satisfies the *constitutional* standing requirement that his asserted injury would be meaningfully redressed by a decision in his favor. Defendants in the case have argued that the redressability component of Article III standing is absent because the fiduciary of a plan could exercise its discretion not to allocate the proceeds of any recovery to former participants.

A third issue left open by *LaRue* is whether—as the Chief Justice and Justice Kennedy suggested—a claimant suing over losses to his account should first present a claim under ERISA § 502(a)(1). The majority opinion seemingly left this question open when it stated in a footnote, "[W]e do not decide . . . whether [plaintiff] was required to exhaust remedies set forth in the Plan before seeking

relief in federal court pursuant to § 502(a)(2)." 128 S.Ct. at 1024 n.3. This particular question had received sustained attention in stock drop litigation to date, but is now likely to be examined closely in light of the views expressed by the Chief Justice.

The Big Picture

Although *LaRue* marks one of the Supreme Court's first forays into defined contribution plans, how the Court will address some of the most hotly-disputed questions in 401(k) plan litigation remains to be seen. One of the most fundamental questions in the case law is the standard of care to be exercised by fiduciaries with respect to retirement accounts whose purpose is to give individual employees considerable autonomy over investment decisions. *LaRue* makes clear that in evaluating fiduciaries' duties in this area, it will not do to uncritically transpose every statement the Court has made about fiduciaries' responsibilities toward defined benefit plans; the two types of plans can have important differences, *LaRue* recognizes, and there is a case to be made for a markedly less intrusive role for fiduciaries when participants are able to collect relevant information on the market and to implement their own investment decisions.

LaRue also marks a less text-based, more purposive approach toward statutory interpretation than other recent Supreme Court ERISA decisions. In *Mertens v. Hewitt Assocs.*, [508 U.S. 248](#), 261–62 (1993), the Court had commented that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration. This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." In *LaRue*, however, the harms at issue emerged as an important determinant in the Court's opinion.

Perhaps most important, *LaRue* makes clear that the different Justices are receptive to a variety of different arguments in this area; what constitutes the prevailing wisdom among practitioners and the appellate courts today will be open to thorough reconsideration when the next 401(k) plan case reaches the Supreme Court.

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