

Supreme Court Expands Liability Exposure of Fiduciaries of Individual Account Plans

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In a unanimous decision, the U.S. Supreme Court has held that individual participants in defined contribution plans can sue to recover losses incurred by their individual plan accounts. The long-anticipated decision in *LaRue v. DeWolff, Boberg & Associates, Inc.* will affect the rights and obligations of participants, sponsors, and fiduciaries of all defined contribution plans, including 401(k), profit-sharing, and employee stock ownership plans.

LaRue was a participant in the DeWolff, Boberg & Associates, Inc. 401(k) plan, a defined contribution plan that permitted participants to self-direct the investment of their contributions. The plan fiduciaries failed to follow his investment directions, and LaRue sought money damages equal to the amount by which his account had been diminished (approximately \$150,000). In the district court, LaRue based his claim on ERISA § 502(a)(3), which permits participants, beneficiaries, or fiduciaries to sue to obtain appropriate equitable relief to redress violations or enforce provisions of ERISA or the plan.

The district court dismissed the lawsuit, finding that LaRue's suit was not a claim for equitable relief, but rather was a claim for money damages, not recoverable under ERISA. On appeal to the Fourth Circuit, LaRue argued that, in addition to his claim under ERISA § 502(a)(3), he also had a claim cognizable under ERISA § 502(a)(2). That provision authorizes suits for breach of fiduciary duty under ERISA § 409(a). It holds fiduciaries personally liable for losses to the plan and does not limit the relief available to "equitable" relief.

The Fourth Circuit agreed with the district court and held that money damages were not available under ERISA § 502(a)(3). The court also rejected LaRue's claim under ERISA §§ 502(a)(2) and 409(a), holding that those sections provided only relief for the entire plan. Because LaRue was suing only for himself and to recover losses only to his individual account, the Fourth Circuit reasoned that he was not seeking relief on behalf of the plan.

On appeal to the Supreme Court, the question was whether LaRue was seeking relief for losses to the plan as permitted under ERISA §§ 502(a)(2) and 409(a), or whether he was seeking individual relief that would only be available under ERISA § 502(a)(3). The Court concluded that fiduciary misconduct "need not threaten the solvency of the entire plan" and held that ERISA §§ 502(a)(2) and 409(a) protect the financial integrity of the plan, regardless of whether a fiduciary breach harms all participants or just individual accounts. The Court also explained that a statement in a prior opinion—*Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985)—that ERISA only allowed recovery for losses to the plan "as a whole" was made in the context of a defined benefit plan, in which plan assets were not

allocated to any particular participants, but rather belonged to the plan as a whole. In the defined contribution context, however, assets are allocated to specific accounts. Accordingly, the Supreme Court explained, any loss to any account was a loss “to the plan.” The Court found additional support for its reading of ERISA § 502(a)(2) in § 404(c), whose exemption of fiduciaries from losses caused by participant direction of their individual accounts would be superfluous if a fiduciary could never be liable for losses to an individual account.

Concurring in the judgment, Chief Justice Roberts, joined by Justice Kennedy, cautioned that courts consider whether the type of claim brought by LaRue should only be permitted to proceed under ERISA § 502(a)(1)(B)—an issue not raised by either party or the courts below. Specifically, the Chief Justice pointed out that LaRue’s right to direct the investment of his account was a right granted by and governed by the plan. LaRue’s suit, in substance, sought benefits that would have been due to him if the plan had carried out his investment elections. Therefore, LaRue’s claim was essentially a claim for benefits that turns on the application and interpretation of plan terms, and lies under ERISA § 502(a)(1)(B), which has prerequisites to suit different from those attendant to an ERISA § 502(a)(2) claim. These include the requirement that a participant must exhaust administrative remedies under the plan in pursuing his claim before filing a federal lawsuit.

The Chief Justice also wrote that, if LaRue’s claim may be brought under ERISA § 502(a)(1)(B), he may be precluded from bringing the same claim under ERISA § 502(a)(2). The Chief Justice also expressed concern that allowing participants to craft a claim for benefits as an ERISA § 502(a)(2) claim for breach of fiduciary duty would circumvent the safeguards for plan administrators, in particular, their discretion to determine eligibility for benefits and the terms of the plan.

Justice Thomas, joined by Justice Scalia, also concurred, writing that ERISA § 502(a)(2) applied to LaRue’s action, not because of a shift in the pension plan market from defined benefit to defined contribution plans (as the majority suggested), but based on the plain language of the statute. In Justice Thomas’s view, the assets in a defined contribution plan under ERISA constitute the sum of all of the assets allocated for bookkeeping purposes to individual accounts. “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’ for purposes of § 409(a).”

What does the Court’s decision mean for defined contribution plan sponsors? More litigation, for sure. Previously the courts were split on the question of whether an individual could sue for relief under ERISA § 502(a)(2). The *LaRue* decision temporarily resolves the question in favor of allowing individual participants to bring suit under that section so long as any recovery goes into the plan rather than into the participant’s pocket. Thus, the decision opens the courtroom door more widely to individual participant lawsuits. Nevertheless, Chief Justice Roberts’s concurring opinion leaves unanswered how an individual plaintiff will perfect a claim for investment losses under defined contribution plans, and whether, in the end, other sections of ERISA afford defenses to such claims or take precedence over ERISA § 502(a)(2). The lower courts will also likely struggle to apply *LaRue*, and the defenses suggested by Chief Justice Roberts, to cases involving investment loss (or ERISA “stock drop”) and fee challenges that are in litigation throughout the country. At bottom, however, there is little doubt that the plaintiffs’ counsel will view *LaRue* as a green light to assert a host of claims under ERISA § 502(a)(2) because of the broader remedies available under that section.

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