When One Plan Participant Claims Unique Harm

By Dodd S. Griffith

What Have We Learned about ERISA Fiduciary Liability since *LaRue*?

The unanimous decision of the United States Supreme Court in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 128 S. Ct. 1020 (2008), overturned prior law by authorizing recovery by individual participants in defined contribution plans for fiduciary breaches that impaired the value of plan assets in a participant's individual account. A majority of federal appellate courts had concluded that an earlier Supreme Court case, *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134 (1985), precluded these claims for monetary relief, unless they benefited all plan participants. In the *LaRue* decision, the Supreme Court made clear that its holding in *Russell*, which related to a defined benefit provided under a disability plan, did not preclude individual plan participants from obtaining monetary relief for fiduciary breaches that resulted in losses only to individual accounts. Consequently, fiduciaries of 401(k) plans and other types of defined contribution plans are now potentially subject to a far broader range of claims for breach of fiduciary duty than might have previously been thought. While it is too soon to gauge the full impact of the *LaRue* decision, a number of lower court decisions citing *LaRue* provide useful insight on how *LaRue* will affect ERISA fiduciaries going forward. *LaRue* and the fiduciary liability cases that followed in its footsteps also provide useful guidance on steps that ERISA fiduciaries should take to limit potential liability to plan participants.

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Why Was *LaRue* Decided Differently from *Russell*?

To understand *LaRue* and the lower court decisions that followed, one must understand a little bit about the claims for relief permitted under ERISA, and who is entitled to assert those claims. *LaRue* involved three potential claims under ERISA: claims for benefits under Section 502(a)(1)(B); claims for restoration of losses to the plan caused by fiduciary breach under Section 502(a)(2); and claims for equitable remedies for all other breaches of the plan or ERISA under Section 502(a)(3).

It has been accepted that individual plan participants may bring claims for equitable relief under Section 502(a)(3), but the federal appellate circuits had been split on whether the "make whole" relief allowed with claims brought under Section 502(a)(2) was available to individual plan participants. Many of the circuit courts had limited the right to bring claims for monetary relief under Section 502(a)(2) to those fiduciary breach claims made by representative plaintiffs suing on behalf of an entire plan, who could demonstrate that the fiduciary breach had harmed the plan as a whole, and not just an individual participant's account. Consequently, in these circuits, an individual plan participant could not sue for monetary relief based on a fiduciary breach that affected only that participant's account.

The circuits that limited claims for monetary relief under Section 502(a)(2) to those fiduciary breach claims seeking to recover on behalf of a plan as a whole relied on the *Russell* case. The Supreme Court in *LaRue* clearly distinguished that decision from its *Russell* decision in two key ways: (1) the breach of fiduciary duty alleged by LaRue constituted a violation of ERISA Section 409(a), which was not the case in *Russell*; and (2) the ERISA-governed plan at issue in *LaRue*, a 401(k) plan, was a defined contribution plan, whereas the plan at issue in *Russell* was a defined benefit plan.

First, the Court in *LaRue* assumed that the fiduciary breaches alleged by the plaintiff constituted violations of ERISA Section 409(a), which partly explains the Court's holding. A violation of ERISA Section 409 is a necessary prerequisite to a claim for relief under Section 502(a)(2). Section 409(a) provides that:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach….

In *LaRue*, the Court observed that the misconduct alleged in *Russell*, even if presumed true, did not amount to a claim under ERISA Section 409. The plaintiff in *Russell* received all of the disability benefits to which she was entitled under the terms of her plan, and merely alleged consequential damages arising from a delay in the fiduciary's processing of her claim. In contrast, LaRue alleged that the fiduciary breached obligations defined in Section 409, and that those breaches had an adverse impact on the value of the plan assets in his individual account.

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Second, the nature of the retirement plan at issue in the *LaRue* case partly explains the Court's *LaRue* holding. The *LaRue* case involved a 401(k) plan, which is a type of defined contribution plan. In defined contribution plans, each plan participant has an individual account, and the participant's retirement benefits are paid solely from the assets held in that account. In contrast, the *Russell* case involved a defined benefit plan—specifically, a disability plan—in which benefits payments depended on the performance of the plan as a whole. In *LaRue*, the Court recognized that alleged violations of ERISA Section 409(a) impact defined contribution plans differently than they impact defined benefit plans, and distinguished its holding in *Russell* on that basis.

The *Russell* case was decided at a time when most ERISA-governed retirement plans were still traditional defined benefit pension plans, and consequently, the Court's decision in that case focused on the proper standards for applying ERISA fiduciary breach claims to defined benefit plans. *LaRue*, 128 S. Ct. at 1025. As the Court noted in *Russell*, a breach of fiduciary duty pertaining to a defined benefit plan will not have an adverse impact on a participant in that plan unless the breach creates or enhances the risk of default by the "entire plan." *Id.* This is because the benefits payable to participants in a defined benefit plan depend on the solvency and investment performance of the plan as a whole, and they are usually not adversely affected by a fiduciary breaching the rights of an individual beneficiary of that plan.

In contrast, the benefits payable to participants in a defined contribution plan such as a 401(k) plan can be adversely affected by fiduciary misconduct that does not threaten the solvency of the plan as a whole. This is because the benefits payable to participants in defined contribution plans are determine solely by reference to the balances accrued in individual accounts that are payable to plan participants at retirement. Thus, the Court recognized that in the context of a defined contribution plan, it is quite feasible that the fiduciary's conduct with respect to an individual participant's account can have a material adverse impact of the sort contemplated by ERISA Section 409, regardless of whether that conduct impacts the plan as a whole. Consequently, in *LaRue* the Court held that its focus on fiduciary conduct that affected the "entire plan" was entirely "beside the point in the defined contribution context." *Id.*

The *LaRue* decision expressly recognized that defined contribution plans, such as the 401(k) plan at issue in *LaRue*, "dominate the retirement plan scene today." *Id.* However, as is plain from the concurring opinions in *LaRue*, and the lower court cases that have followed, *LaRue* left many important questions unanswered. The remainder of this article will explore how case law subsequent to *LaRue* is starting to answer some of those questions and some of the lessons that plan sponsors and fiduciaries can learn from *LaRue* and its progeny.

What Issues Remain Unresolved after *LaRue*?

While the Supreme Court's decision in *LaRue* was unanimous, the Court split on the legal rationale for allowing LaRue's claim to proceed. Justice Stevens, in the majority opinion, stated that "although §502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." *LaRue*, 128 S. Ct. at 1026. In his concurring opinion, Chief Justice Roberts, joined by Justice Kennedy, questioned this rationale and pointed to an alternate theory of recovery under Section 502(a)(1)(B), which allows a plan participant or beneficiary "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." 29 U.S.C. §1132(a)(1)(B). As Chief Justice Roberts aptly noted, the distinction between a Section 502(a)(1)(B) claim and one under Section 502(a)(2) is not simply a matter of picking the correct provision to cite in a complaint. *LaRue*, 128 S. Ct. at 1027.

A plan fiduciary could be at a significant disadvantage if a claim that should properly be brought under Section 502(a)(1)(B) is allowed to be recast as a Section 502(a)(2) claim. As Chief Justice Roberts pointed out, plan fiduciaries are afforded certain safeguards under Section 502(a)(1)(B) that are unavailable under Section 502(a)(2). These protections include the generally recognized requirement that a plan participant exhaust the administrative remedies mandated by ERISA Section 503 before filing suit under Section 502(a)(1)(B), and the right, under ERISA, to grant administrators and fiduciaries discretion in determining benefit eligibility and the meaning of plan terms—determinations that courts may review only for abuses of discretion. *Id.* Consequently, if a plan participant is allowed to bring a claim under Section 502(a)(2) for what is really a Section 501(a)(1)(B) claim for benefits, then it may be possible for the participant to circumvent certain provisions of the plan that are intended to safeguard plan fiduciaries from certain unnecessary or unwarranted claims. *Id.*

Chief Justice Roberts highlighted at length the issues that were not decided by *LaRue*, and provided a road map for considering these issues on remand. His opinion is instructive and provides many useful tools for analyzing the facts underlying the fiduciary breaches claimed by LaRue and similarly situated plaintiffs.

First, Chief Justice Roberts noted that the Court chose not to answer whether a claimant must exhaust administrative remedies to seek recovery for a breach of fiduciary duty under Section 502(a)(2). *LaRue*, 128 S. Ct. at 1027, citing footnote 3 at 1024. The Chief Justice also observed that, since LaRue did not make a plan benefits claim under Section 502(a)(1)(B), the lower courts had no occasion to determine whether a fiduciary breach claim under Section 502(a)(2) was precluded when a participant could make a claim for plan benefits under Section 501(a)(1)(B). The Chief Justice concluded, as a result, that lower courts were not precluded from considering whether LaRue's claim could proceed only under Section 502(a)(1)(B) as a claim for benefits.

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If lower courts adopted this approach, it would likely benefit plan fiduciaries, because participants would be required to exhaust administrative remedies before bringing an ERISA claim in court. Further, the decisions made by plan fiduciaries would be afforded additional deference in areas such as properly interpreting plan terms and whether a participant is eligible for plan benefits.

In a separate concurring opinion, Justice Thomas, joined by Justice Scalia, agreed with the majority's conclusion that Section 502(a)(2) authorized LaRue's individual claim for monetary relief as a result of an alleged breach of fiduciary duty. However, Justice Thomas based his concurring opinion on the plain language of ERISA, rather than the perceived intent of ERISA's drafters. Justice Thomas concluded that losses to LaRue's individual 401(k) plan account caused by alleged fiduciary duty breaches were, by definition, losses "to the plan." *LaRue*, 128 S. Ct. at 1028–1029. Consequently, he concluded that these losses permitted a claim under Section 502(a)(2) to recover the losses on behalf of the plan. *Id.*

It is not entirely clear whether Justice Thomas intended his approach to make it easier for plan participants to obtain monetary relief for fiduciary breaches. On the one hand, if the lower courts applied the "plain language" interpretation of ERISA Sections 409(a) and 502(a)(2) provided by Justice Thomas, participants in defined contribution plans might ultimately more easily sue for monetary relief for alleged fiduciary breaches. On the other hand, in a footnote to his concurring opinion, Justice Thomas noted that participants who sued under Section 502(a)(2) to recover benefits on behalf of a defined contribution plan were not entitled to monetary relief paid directly to them. *LaRue*, 128 S. Ct. at 1029 n.*. Instead, Justice Thomas noted that the plan must receive recovered losses. *Id.*

While this suggests that the alternate analysis proposed by Justice Thomas will not make it easier for participants in defined contribution plans to recover monetary relief directly, requiring payment to a plan rather than to plan participants may not provide much of a limit from a practical standpoint in those cases in which individual plan participants sustain losses.

Since losses sustained by a defined contribution plan are reflected in the balances in the plan accounts of affected participants, losses recovered by a plan must be allocated to one or more individual accounts. Presumably, this means that monetary relief would ultimately be allocated to the individual plan participant accounts if these participants succeed with claims for breach of fiduciary duty—effectively benefiting them directly through monetary relief for breaches of fiduciary duty that cause losses to their accounts.

Consequently, it appears that the analysis proposed by Justice Thomas, if adopted more broadly by lower courts, could significantly broaden the liability of plan fiduciaries and is arguably a significant departure from the more measured approaches proposed in the majority opinion and in the Chief Justice's concurring opinion.

How Has *LaRue* Impacted Fiduciary Liability?

Some Courts View *LaRue* as Very Limited

First, defense counsel should be heartened to learn that the *LaRue* decision can be useful when defending ERISA fiduciary breach claims. In *Cook v. Campbell*, 2008 WL 2039501 (M.D. Ala. 2008), the court applied a careful analysis of the *LaRue* case to support its decision denying a request to reconsider its dismissal of breach of fiduciary duty claims in a case involving an employee stock ownership plan (ESOP).

In *Cook*, ESOP participants alleged that a plan fiduciary breached his duties in a way that negatively impacted the value of the company stock used to fund the ESOP. Thus, as in *Russell*, the alleged fiduciary breach affected the plan as a whole. This set of facts was in marked contrast to the facts found in *LaRue*: LaRue alleged that the fiduciary failed to execute his instructions on how to invest his 401(k) plan account.

Given that the alleged fiduciary breach in *Cook* affected the plan as a whole, rather than an individual plan participant, the *Cook* court saw no reason to depart from the traditional analysis applied in the *Russell* case. In addition, the *Cook* court borrowed heavily from Chief Justice Robert's concurring opinion in *LaRue* and found that the claims raised by the plaintiffs in the *Cook* case were really just claims for benefits due them, which should be brought under ERISA Section 502(a)(1)(B), not Section 502(a)(2). The *Cook* court also found that the plaintiffs had not exhausted their administrative remedies under the ESOP, and thus were not entitled to sue under Section 502(a)(1)(B). Moreover, the court cited Justice Thomas's concurring opinion to propose that the *Cook* plaintiffs were barred from seeking relief for plan benefits payable directly to themselves, since ERISA Section 502(a)(2) allowed only for recovery on behalf of the plan, perhaps suggesting that the payment distinction made by Justice Thomas may be significant in cases in which plaintiffs are unable to allege individual damages affecting only their own accounts, rather than those that affect a plan as a whole.

Other courts have also interpreted *LaRue* as providing a limited exception to the traditional analysis set forth in the *Russell* case. In *Spinner v. Anthem Health Plans of Virginia*, 589 F. Supp. 2d 738, 740 (W.D. Va. 2008), the court granted a motion to dismiss a fiduciary breach action related to a claim for health coverage under a group health plan. The *Spinner* court, in dismissing the plaintiff's claim, described *LaRue* as a "very limited exception" to the rule restricting recovery under ERISA Section 502(a)(2) to actions brought on behalf of an entire plan. *Id.* at 745.

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LaRue's Concurring Opinions May Limit Fiduciary Breach Claims

As in the *Cook* case, the court in *Crider v. Life Insurance Company of North America*, 2008 WL 2782871, at *3 (W.D. Ky. 2008), cited Chief Justice Robert's concurring opinion in the *LaRue* decision to support its decision to dismiss the plaintiff's claim for breach of fiduciary duty. The plaintiff in *Crider* sought to amend her claim to allege breach of fiduciary duty. On review, the court denied Crider's motion, on the ground that the claimed breach of fiduciary duty was really nothing more than a disguised claim for benefits under Section 502(a)(1)(B). Citing the concerns raised by Chief Justice Roberts in *LaRue*, the court denied the motion to amend.

Citing *LaRue* Has Not Yet Defeated Class Certification

Defendants have tried to use the *LaRue* decision to support motions to deny the certification of class actions alleging fiduciary duty breaches in stock drop and excessive fee cases on the grounds that the losses caused to individual participants' accounts by the alleged breaches would be too specific to allow for class certification. While these defensive tactics make a certain amount of sense, no reported decision has cited the *LaRue* decision as a basis for prohibiting class certification. *See, e.g.*, *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102 (N.D. Cal. 2008); *see also*, *In re First American Corp. ERISA Litigation*, 2009 WL 928294 (C.D. Cal. 2009); *and see Jones v. Novastar Financial, Inc.*, 2009 WL 943563 (W.D. Mo. 2009). The closest that defendants have come to a victory using this tactic is in the case of *Bendaoud v. Hodgson*, 578 F. Supp. 2d 257, 266–67 (D. Mass. 2008). That case involved alleged fiduciary breaches pertaining to a stock option backdating scandal. The plaintiff sought to sue on behalf of the plan, but the defendant alleged there was no standing for it because the plaintiff was not injured by the backdating scandal. The court sided with the defendant, based on the fact that the plaintiff was a participant in a defined contribution plan, and as a result, had no pecuniary interest in the account of any other plan participant. The court held that the plaintiff had no need to seek recovery on behalf of the plan as a whole, and had no right to do so, because he was not harmed by the loss suffered by any other plan participant and any recovery on behalf of such participants would not benefit him. While the court's holding in *Bendaoud* precluded the plaintiff in that case from representing a class, since he had not been injured in the manner alleged, the court was careful to note that a fiduciary's breach can affect more than one defined contribution plan participant, and that in that instance, "the proper approach is joinder of the affected participants or the certification of a class." *Id.* at 266.

Potential Hazards of Section 502(a)(2) Claims

A recent First Circuit case illustrates the potential hazards to plan fiduciaries that can arise when participants in defined contribution plans are permitted to use ERISA Section 502(a)(2) to sue for monetary relief. In *Evans v. Akers*, 534 F.3d 65 (1st Cir. 2008), former employees of W.R. Grace & Company, who received lump-sum distributions of the entire account balances contained in their former employer's defined contribution plan, alleged fiduciary breaches that diminished the value of their accounts. The *Evans* case is essentially a stock drop case. Although the *Evans* case did not break much new ground respecting *LaRue*'s application, it illustrates the potential significance that a Section 502(a)(2) claim for monetary relief can have on an employer. First, the court in *Evans* applied existing case law to rule that the former employees of Grace that had received lump sum distributions were still plan participants entitled to bring a claim under Section 502(a)(2) of ERISA. Then the court described why Section 502(a)(2) claims were particularly beneficial to these participants:

> Using a §[502](a)(1)(B) suit to force the plan to use money already allocated to others' accounts to make good on the plaintiff's loss would present a host of difficulties with which few sensible plaintiffs would want to contend. Indeed, it may be that ERISA's fiduciary obligations prevent plans from paying judgments out of funds allocable to other participants, in which case the plan, though liable, would be judgment proof. Thus, for most plaintiffs the sensible route is to use §[502](a)(2) to get the money in the first instance from a solvent party liable to make good on the loss, not from the plan itself. *Graden*, 496 F.3d at 301. Bringing the suit under §502(a)(2) does not "change the underlying nature" of the plaintiffs' claim as one for benefits. It simply provides an avenue for restoring those benefits to the plan coffers so that they may then be allocated to those who were harmed by the fiduciary breach. *Id.*; *see also LaRue*, 128 S. Ct. at 1026 (holding that §502(a)(2) "authorize[s] recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account").

Evans, 534 F.3d at 72–73.

Standing of Former Defined Contribution Plan Participants to Sue

While *Evans* did not cite *LaRue* directly for the proposition that former participants in defined contribution plans have standing to sue under Section 502(a)(2), it is noteworthy that *LaRue* can be cited precisely for this purpose. In *Buus v. WAMU Pension Plan*, 251 F.R.D. 578, 582 (W.D. Wash. 2008), the court noted that the *LaRue* decision conclusively resolved, in the affirmative, whether former employees who have "cashed out" of their plans by receiving lump-sum payments are plan participants for purposes of ERISA. The *Buus* court's reading of *LaRue*, however, may be overbroad. LaRue was allowed to maintain a claim under Section

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502(a)(2) after withdrawing his account balance because the court found that he retained "a colorable claim for benefits." *LaRue*, 128 S. Ct. at 1026, n. 6.

Notwithstanding the unambiguous language in *LaRue* that is noted above, there is some disagreement among the lower courts concerning whether and the extent to which the *LaRue* Court resolved this issue. *See In re Mutual Funds Investment Litigation*, 529 F.3d 207 (4th Cir. 2008) (interpreting *LaRue* broadly to provide standing to former plan participants); *see also Morrison v. Moneygram International, Inc.*, 607 F. Supp. 2d 1033 (D. Minn. 2009) (rejecting the narrower interpretations of *LaRue* and finding that former participants had standing to sue); *see also Vaughn v. Bay Environmental Management, Inc.*, 544 F.3d 1008, 1014 n. 9 (9th Cir. 2008) (holding that *LaRue* was not controlling on this issue because it did not address the meaning of "participant" or the distinction between benefits and damages); *and see Gipson v. Wells Fargo & Company*, 2009 WL 702004 at *3 (D. Minn. 2009) (court was not convinced that the footnote in *LaRue* was intended to imply that all former plan participants have standing to bring claims for breaches of fiduciary duty under ERISA).

While *LaRue* does clearly extend some rights to former plan participants if they have suffered plan injuries, the *LaRue* Court carefully noted that it did not intend to provide a remedy for individual injuries that are distinct from plan injuries. *LaRue*, 128 S. Ct. at 1026. Thus, if a defendant can successfully argue that a former plan participant's claim is for an individual injury rather than a plan injury, the fiduciary breach claim may be foreclosed. *See, e.g.*, *Young v. Principal Financial Group, Inc.*, 547 F. Supp. 2d 965, 977 (S.D. Iowa 2008) (holding that while the plaintiffs were injured when they were misled by "benefits counselors" affiliated with the administrator of their former employer's 401(k) plan who convinced them to roll over their 401(k) plan assets into certain mutual funds recommended by the counselors—these injuries were suffered after they were no longer plan participants).

What Lessons Can Be Learned from *LaRue* and Its Progeny?

While it will be some time before we can assess the real impact of *LaRue* and the cases that have followed, it is possible to take certain lessons from these cases today. First, it is very important for company counsel and defense counsel to understand the technical nature of ERISA fiduciary breach claims. A clear understanding of the prerequisites to bringing these claims can often help plan sponsors and fiduciaries defend themselves against potential claims. Counsel should determine whether a plaintiff or putative class of plaintiffs is in fact, considered a plan participant or plan participants. Counsel should determine whether the claims raised by the plaintiffs are plan claims, or instead, claims for individual damages that fall outside of the plans. If the plaintiffs have stated cognizable claims under ERISA, the claims should be carefully examined to determine whether all ERISA prerequisites have been satisfied. Finally, counsel should determine whether the claims permit the plaintiffs to obtain monetary relief, and if so, whether plaintiffs can directly receive payments or if the plans must receive payments. While *LaRue* expanded the potential for fiduciary liability, particularly in the context of defined contribution plans, it also provides a useful roadmap for many potential defenses, provided that counsel carefully analyze the claims alleged.