

One Minute Memo[®]



The Supreme Court Expands the Scope of ERISA Claims

The Supreme Court has ruled that a 401(k) plan participant may proceed with a claim to recover for losses allegedly caused by the failure to properly implement investment directions. In a decision that may prove the axiom that bad facts make bad law, on February 20, 2008, the Supreme Court vacated a decision of the Court of Appeals for the Fourth Circuit limiting the scope of allowable claims under ERISA. The case is *LaRue v. DeWolff, Boberg & Associates, Inc.*, No. 06-856. The *LaRue* decision has been much anticipated since a spirited oral argument before the Supreme Court on November 26, 2007.

The facts of *LaRue* are straightforward. Mr. LaRue participated in the DeWolff 401(k) Plan. The Plan permitted participants to direct the investment of their contributions in accordance with specified procedures and requirements. Mr. LaRue alleged—and in the unique procedural posture of the case, it was assumed as true—that in 2001 and 2002 he directed DeWolff to make certain changes to the investments in his individual account. He alleged that DeWolff's failure to carry out those instructions was a breach of its ERISA fiduciary duties and

that the omission reduced the value of his interest in the Plan by \$150,000.

The Court of Appeals dismissed Mr. LaRue's claim, holding that ERISA did not permit his claim because he was not seeking money for the Plan as a whole, nor was he seeking the return of Plan assets improperly taken by the fiduciary.

The Supreme Court vacated the Court of Appeals' decision. It held only that Mr. LaRue could bring his claim under Section 502(a)(2) of ERISA, which allows a claim for "appropriate relief" under ERISA Section 409. ERISA Section 409, under certain circumstances, allows recovery of money to a plan when there is a breach of fiduciary duty. The majority opinion reasoned that statements in a 1985 Supreme Court decision that recoveries under Section 502(a)(2) are permitted only if they would benefit the entire plan, could not be reconciled with the modern trend away from defined benefit plans (where benefits are based upon a formula) and toward individual account plans (where benefits are based upon contributions and investment returns).

The reasoning used in the majority's opinion is likely to raise a number of issues that will need to be sorted out in future cases. These issues include:

- Which "he said/she said" ERISA fiduciary breach cases can be said to arise under Section 502(a)(2)?
- Does Section 502(a)(2) permit all make-whole relief?
- Given the majority's reliance on ERISA legislative history, what exactly is the role of legislative history in deciding ERISA cases?
- Does the majority's citation of a trend in favor of defined contribution, as opposed to defined benefit, plans, signal a new role for benefits trends in deciding ERISA cases?
- Must a Section 502(a)(2) claimant exhaust her administrative remedies before bringing suit?
- What exactly are acts of "misuse and mismanagement of plan assets by plan administrators," a passage from ERISA legislative history that the Court quoted?
- Does the *LaRue* decision apply in the welfare plan context?

It is worth noting that Chief Justice Roberts filed a concurring opinion in which he suggested that some Section 502(a)(2) claims might better be characterized as Section 502(a)(1)(B) claims. His comments will likely lead to further litigation over the proper scope of 502(a)(1)(B), and might cause fiduciaries to decide issues in the first instance that previously were left to the courts. Justices Thomas and Scalia also filed a concurring opinion that is notable for its limitations. It simply stated that Mr. LaRue could proceed with his case only because his individual account is merely a bookkeeping entry, so he must be seeking Plan relief under Section 502(a)(2).

Much more will be said about *LaRue* in the coming days, months and years. If you have any questions regarding this One Minute Memo, please contact the Seyfarth Shaw attorney with whom you work, or any Employee Benefits or ERISA/Employee Benefits Litigation attorney on our website, www.seyfarth.com.

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