

# One Minute Memo<sup>®</sup>



## The Supreme Court will Decide a 401(K) Case that Addresses the Scope of ERISA Remedies

One of the more vexing aspects of ERISA is defining what remedies the statute permits. The Supreme Court has just agreed to decide a case on this subject. The case, *LaRue v. DeWolff, Boberg & Associates*, arises in the context of 401(k) plans, which are fast becoming the principal vehicle for retirement benefits for American employees. The *LaRue* case, therefore, will be a critically important one for employers to monitor in the Supreme Court's 2007-2008 term.

In *LaRue*, the plaintiff alleges that defendant fiduciaries breached fiduciary duties owed to him by failing to implement his investment strategy for his 401(k) retirement plan. He seeks recovery of the amount by which his account would have appreciated had defendants followed his instructions. Both the district court and the Court of Appeals for the Fourth Circuit rejected plaintiff's claim and held that ERISA simply does not provide for the remedy plaintiff seeks. Both courts dismissed his federal complaint.

The Court of Appeals decision now under review by the Supreme Court first explained the legislative backdrop to the enactment of ERISA. The Court said that Congress intended to limit civil remedies and to preempt previously available state-law causes of action, in order to create

a uniform federal scheme to regulate employee benefit plans. In a classic understatement, the Court stated that Section 502(a) of ERISA "stops short of providing ERISA complainants with a full arsenal of relief."

Plaintiff *LaRue* first sought to recover money under Section 409 of the statute. That section provides that a fiduciary who breaches their duties set forth in ERISA "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate." The Court of Appeals said that this section did not allow relief to the plaintiff because he sought individualized relief, and Section 409 allows relief only to the benefit of the plan as a whole. The first issue that the Supreme Court will decide is whether plaintiff's sought-after remedy can be said to inure to the benefit of the plan so as to allow him the relief that Section 409 permits.

Plaintiff next sought relief under Section 502(a)(3) of the statute, which permits "other appropriate equitable relief." The Fourth Circuit said that the word "equitable" is a word of limitation and, citing the Supreme Court's *Sereboff*

case of last year, said it means only those categories of relief typically available in equity. The Court then stated that “equitable” generally is limited to injunctions and restitution, but does not include money damages. The issue then became the meaning of “restitution.” The Fourth Circuit said that restitution is limited to taking from the defendant fiduciary funds in his possession that are owed to the plaintiff, and his profits earned by those funds. The defendant fiduciaries in *LaRue* possessed no funds owed to plaintiff -- they did not possess any money that plaintiff’s 401(k) plan account would have received had they followed plaintiff’s investment instructions -- so plaintiff *LaRue* had no monetary remedy under Section 502(a)(3). The Fourth Circuit concluded that it had no authority to alter the careful balance struck by the Congress in enacting ERISA that encourages the establishment of employee benefit plans by providing for limited remedies and a uniform federal regulatory scheme.

What is striking about this case is that the Solicitor General has taken the position that the Fourth Circuit’s ruling is wrong.

Many commentators have complained that ERISA remedies are too limited, but Congress has not yet amended the statute to expand those remedies. Now, the Supreme Court will weigh in on the issue. Its ruling in *LaRue* will be greatly anticipated, as the first level of analysis in any ERISA case is whether the plaintiff can recover any monetary remedy even if he proves a violation of the statute.

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