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Benefits Report

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Supreme Court Rules Defined Contribution Plan Participants Can Sue for Losses to Their Individual Accounts

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AND

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The United States Supreme Court, in *LaRue v. DeWolff, Boberg & Associates, Inc.* ("*LaRue*"), has confirmed the right of a participant in a defined contribution plan to bring a claim for fiduciary breach under ERISA for losses to his or her individual plan account. In so ruling, the court overturned a decision by the Fourth Circuit Court of Appeals, *LaRue v. Dewolff, Robert & Assocs., Inc.*, 458 F.3d 359 (4th Cir. 2006), which had held that a participant who files a suit under ERISA section 502(a)(2) must bring a claim on behalf of the "entire plan" in order to seek monetary relief. The Fourth Circuit had based its reasoning upon the prior Supreme Court decision in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

The Facts and Lower Court Rulings

James LaRue was a participant in a 401(k) plan (the "Plan") administered by DeWolff, Boberg & Associates ("DeWolff"). The Plan permitted participants to direct the investment of their contributions in accordance with the Plan terms. LaRue filed a lawsuit against DeWolff alleging that he had directed a change in his account investments but that DeWolff never carried out his instructions. LaRue claimed that DeWolff's omission was a breach of fiduciary duty under ERISA that had depleted his interest in the Plan by approximately $150,000. LaRue initially sought "equitable relief" under ERISA section 502(a)(3). The District Court dismissed LaRue's lawsuit holding that LaRue was actually seeking "monetary damages" — relief unavailable under ERISA section 502(a)(3). On appeal, LaRue argued that he had a claim for relief under both ERISA section 502(a)(2) and Section 502(a)(3). The Court of Appeals noted that LaRue had raised his Section 502(a)(2) claim for the first time on appeal, but nevertheless rejected it on the merits.

In dismissing LaRue's claim, the Court of Appeals relied on the Supreme Court's holding in *Russell* that ERISA section 502(a)(2) was intended to "protect the entire plan, rather than the rights of an individual beneficiary." Finding that the relief LaRue sought was "personal" (he "desires recovery to be paid into his plan account, an instrument that exists specifically for his benefit"), the Court of Appeals held that no relief was available under Section 502(a)(2). The lower court also rejected LaRue's argument that the relief he sought was "equitable" and thus available under ERISA section 502(a)(3).

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The Supreme Court Decision

The Supreme Court reversed the Fourth Circuit in an opinion authored by Justice Stevens. In reaching its holding, the Supreme Court distinguished the facts of *LaRue* from the facts of *Russell* and distanced itself from the holding in *Russell*. Interestingly, Justice Stevens was also the author of the *Russell* opinion 23 years earlier.

ERISA section 502(a)(2) authorizes plan participants, as well as the Secretary of Labor, plan beneficiaries and fiduciaries, to bring an action for relief under ERISA section 409. According to the Supreme Court in *LaRue*:

> The principal statutory duties imposed on fiduciaries by [section 409] "relate to the proper management, administration, and investment of fund assets," with an eye toward ensuring that "the benefits authorized by the plan" are ultimately paid to participants and beneficiaries."

The Supreme Court found that the misconduct alleged by LaRue, unlike the misconduct alleged by the plaintiff in *Russell*, fell squarely within the scope of conduct Congress was seeking to regulate when it adopted Section 409 because LaRue alleged that the Plan administrator's mismanagement of his Plan account reduced the value of the assets that should have been in his account under the Plan. On the other hand, the plaintiff in *Russell* had received all of the benefits to which she was contractually entitled under the terms of her employer's disability plan, and was seeking consequential damages caused by a delay in the processing of her claim. The Supreme Court stood by its holding in *Russell* that ERISA section 502(a)(2) does not provide a remedy for the type of personal injury Ms. Russell alleged. Though Section 502(a)(2) does not require an injury to the "entire plan", it does apparently require that the fiduciary breach be "with respect to a plan" and that the plan be the victim of the misconduct.

The Supreme Court also relied on changing trends in retirement plans in reaching its holding. The Supreme Court explained that *Russell's* emphasis on protecting the "entire plan" from fiduciary misconduct reflected the former landscape of employee benefit plans and that this concept has lost its relevance in a landscape dominated by defined contribution plans. The Court stated that, in the 1980s, when *Russell* was decided most retirement plans were defined benefit plans. In the context of such plans, misconduct by plan fiduciaries would not affect an individual participant's entitlement to benefits unless it created or increased the risk of default by the entire plan — thus the focus in *Russell* on injury to the "entire plan." The Court recognized that since *Russell* was decided defined contribution plans have become the dominant form of retirement plans, and explained that for defined contribution plans, unlike defined benefit plans, fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. As stated by the Court:

> Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409. Consequently, our references to the "entire plan" in *Russell*, which accurately reflect the operation of § 409 in the defined benefit context, are beside the point in the defined contribution context.

The Supreme Court concluded that ERISA section 502(a)(2) does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.

Should Plan Fiduciaries Be Nervous About *LaRue*?

Following the Supreme Court's decision in *LaRue*, articles in the popular press headlined that the floodgates of ERISA litigation had been opened and plan fiduciaries would be the target of numerous frivolous lawsuits. In our view, the sky is not falling on ERISA fiduciaries because of *LaRue*. The Fourth Circuit's holding, that an individual claim for fiduciary breach could not be brought under ERISA section 502(a)(2), had already been rejected, or at least questioned, by many courts before the Supreme Court stepped in to set the Fourth Circuit straight. In recent years, several courts have held that participants in defined contribution plans can bring a fiduciary breach claim under Section 502(a)(2) where the alleged wrongdoing has not caused losses to the accounts of all plan participants. *See, e.g., Milofsky v. American Airlines, Inc.*, 442 F.3d 311 (5th Cir. 2006) (*en banc*) (allowing a subset of participants to proceed with breach of fiduciary duty claims under ERISA section 502(a)(2)); *see also In re Schering-Plough Corp.*, 420 F.3d 231, 232 (3d Cir. 2005, amended on rehearing Sept. 15, 2005) (same); *Hill v. Tribune Co.*, 2006 WL 2861016 (N.D. Ill. Sept. 29, 2006) (same); *Rogers v. Baxter Int'l*, 417 F. Supp. 2d 974, 982 (N.D. Ill. 2006) (same); *Woods v. Southern Co.*, 396 F. Supp. 2d 1351, 1361–63 (N.D. Ga. 2005) (same). Indeed, even while *LaRue* was pending before

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the Supreme Court, the Sixth Circuit ruled that individual participants can pursue fiduciary breach claims under ERISA section 502(a)(2). *See, e.g., Pfahler v. Nat'l Latex Products Co.*, Nos. 06–3677/3678 (6th Cir. Dec. 14, 2007) (individuals seeking damages to their own personal plan accounts could proceed under Section 502(a)(2)); *Tullis v. UMB Bank*, No. 06–4632/4633 (6th Cir. January 28, 2008) (same). Individual claims for fiduciary breach in defined contribution plans are really nothing new and we believe the Supreme Court's opinion in *LaRue* should have little impact on whether these cases go forward, outside of the Fourth Circuit.

Far from being a setback, employers and plan fiduciaries defending against *LaRue*-type claims may find that the multiple opinions issued by the Supreme Court in *LaRue* have provided them with some extra protection. The majority opinion leaves open the question of whether a participant must exhaust administrative remedies prior to filing an individual claim for breach of fiduciary duty under ERISA section 502(a)(2). The lower courts are currently divided on this issue. *See, e.g., Milofsky v. American Airlines, Inc.*, 442 F.3d 311, 313 (5th Cir. 2006) (no exhaustion required for breach of fiduciary claim); *Smith v. Sydnor, Inc.*, 184 F.3d 356, 364 (4th Cir. 1999), cert. denied, 528 U.S. 116 (2000) (same); *but see Mason v. Continental Group., Inc.*, 763 F.2d 1219, 1226–27 (11th Cir. 1985) (exhaustion of administrative remedies required prior to bringing fiduciary breach claim); *Spivey v. Southern Company*, 427 F. Supp. 2d 1144 (N.D. Ga. 2006) (same). This divided issue in ERISA jurisprudence will continue as a powerful defense in some Circuits, and may gain a foothold in others.

A concurring opinion by Chief Justice Roberts appears to encourage defense counsel to argue that a *LaRue*-type claim is properly brought only as a claim for benefits, complete with the requirement that the participant first exhaust administrative remedies and subject to the significant deference given by the federal courts in reviewing the decisions by plan fiduciaries on claims for benefits. Chief Justice Roberts states his view that LaRue's claim should have been brought under ERISA section 502(a)(1)(B), as a claim for benefits under the Plan, rather than as a claim for breach of fiduciary duty under ERISA section 502(a)(2). Section 502(a)(2) allows a participant to obtain "appropriate relief" under Section 409, and Roberts questions that relief may not be "appropriate" if another provision, such as Section 502(a)(1)(B), offers an adequate remedy. Similar arguments have been successfully made with respect to ERISA section 502(a)(3) based on similar language. *See Varity Corp. v. Howe et al.*, 516 U.S. 489, 515 (1996). Chief Justice Roberts cautions against the dangers of allowing a claim for benefits to proceed as a claim for breach of fiduciary duty because a plaintiff may circumvent the deferential "abuse of discretion" standard of review often granted to a plan administrator's decision to deny plan benefits. Defense counsel will likely utilize Roberts' reasoning in responding to participant claims for fiduciary breach.

The Court's majority opinion does provide an extra nugget to ERISA plaintiffs suing for "losses" to their plan accounts. In footnote 4 of the opinion, the majority approves of participant claims seeking "lost profits" under Section 502(a)(2). This is a benefit to plaintiffs who, to date, have had to rely on old case law, such as the 23-year-old Second Circuit decision in *Donovan v. Bierwirth*, 745 F.2d 1049 (2d Cir. 1985), for arguments that recoverable losses could include not just assets improperly managed by plan fiduciaries and the resulting losses to the plan, but lost earning potential as well.

The "Plain Text" of the Statute

In addition to Justice Stevens' majority opinion and Chief Justice Robert's concurrence, a second concurrence was penned by Justice Thomas that is based on the statutory text of ERISA and the common sense conclusion that losses to individual accounts in any type of defined contribution plan are "losses" to the plan within the meaning of ERISA section 409 and are recoverable as such. Justice Thomas begins his concurrence by stating that his opinion "is not contingent on trends in the pension plan market… [n]or does it depend on the ostensible "concerns" of ERISA's drafters." According to Thomas, the "unambiguous text" of ERISA section 409 makes clear it authorizes recovery only for the "plan." Thus, the question Thomas takes in his crosshairs is whether losses to a participant's individual plan account resulting from an alleged breach of fiduciary duty are "losses to the plan." Justice Thomas concludes that they are, for the simple reason that assets allocated to a participant's individual account are plan assets. A defined contribution plan is nothing more than the sum of its parts. When a participant sustains losses to his or her individual account as a result of a fiduciary breach, the plan's aggregate assets are diminished by the same amount. Thus, concludes Justice Thomas, Section 502(a)(2) permits a participant to recover such losses on behalf of the plan.

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IRS Issues Guidance for New Distribution Requirements that Become Effective in 2008

KEVIN E. NOLT

The Internal Revenue Service ("IRS") has issued Notice 2008–30, which provides guidance regarding distribution-related provisions of the Pension Protection Act of 2006 ("PPA") that become effective in 2008. In question and answer format, Notice 2008–30 addresses the following:

- rollovers from eligible retirement plans to Roth IRAs;
- additional survivor annuity options;
- interest rate and mortality assumptions for lump sum distributions; and
- gap-period earnings and the distribution of excess elective deferrals.

Notice 2008–30 (the "Notice") is the most significant guidance from the IRS relating to the PPA since Notice 2007–7, which primarily addressed the distribution provisions of the PPA effective in 2007 or earlier. See our January 2007 edition for a discussion of Notice 2007–7. The following article describes the guidance provided in the Notice.

Rollovers to Roth IRAs

Prior to the PPA, Internal Revenue Code ("Code") section 408A provided that a Roth individual retirement account ("Roth IRA") could only accept a rollover contribution from another Roth IRA, a nonRoth IRA (*i.e.*, a traditional IRA or SIMPLE IRA) or from a designed Roth account in a 401(k) plan. The PPA expanded the definition of qualified rollover contribution in Code section 408A to include rollovers from other eligible retirement plans effective for distributions made after December 31, 2007.

In the Notice, the IRS clarifies that distributions from a qualified plan, a 403(b) tax-sheltered annuity, or a governmental 457(b) deferred compensation plan can be rolled over into a Roth IRA. However, for taxable years beginning before January 1, 2010, an individual can not make a qualified rollover contribution from an eligible retirement plan (other than a Roth IRA) if the individual has modified adjustment gross income exceeding $100,000, or is married and files a separate return. The IRS also clarifies that plan administrators are not responsible for determining an individual's eligibility to rollover his or her account to a Roth IRA.

Under the Notice, taxpayers may elect a direct rollover or may receive a distribution from the eligible retirement plan and then contribute to the Roth IRA within 60 days. Withholding is required unless the rollover is direct, though voluntary withholding by agreement is allowed.

The Notice also provides that a plan is not required to permit a nonspouse beneficiary to rollover his or her account to a Roth IRA, but that if it does the rollover must be a direct rollover. We note that while Notice 2007–7 provides that a plan is not required to offer the direct rollover of distributions to nonspouse beneficiaries, pending legislation clarifying portions of the PPA may make nonspouse beneficiary rollovers mandatory. If this comes to pass, the mandatory status may be extended to direct rollovers to Roth IRAs. Finally, the Notice provides that distributions of rolled over amounts from the Roth IRA within 5 years are subject to the 10% premature distribution tax as if the distribution was includible in gross income. Section 1107 of the PPA permits a plan sponsor to delay adopting a plan amendment pursuant to this provision until the last day of the first plan year beginning on or after January 1, 2009 (December 31, 2009 for calendar year plans).

Qualified Optional Survivor Annuity

Defined benefit plans and certain defined contribution plans (*i.e.* money purchase pension plans) generally must provide that accrued benefits are payable in the form of a qualified joint and survivor annuity ("QJSA"). Code section 417(b) defines a QJSA as an annuity for the life of the participant with a survivor annuity for the life of the participant's spouse that is not less than 50% and not more than 100% of the amount of the annuity payable during the joint lives of the participant and the spouse. The PPA amended Code section 417 to require these plans to offer participants a specified optional form of benefit as an alternative to the QJSA. Specifically, for a participant who waives a QJSA, a plan must provide the participant the opportunity to elect a qualified optional survivor annuity ("QOSA") and must provide a written explanation to participants of the terms and conditions of the QOSA. The PPA defines the QOSA as an annuity for the life of a participant with a survivor annuity for the life of the participant's spouse that is equal to a specified "applicable percentage" of the amount of the annuity that is payable during the joint lives of the participant and the spouse, and that is the actuarial equivalent of a single life annuity for the

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life of the participant. The specified "applicable percentage" of the QOSA depends on the level of the spouse survivor annuity provided under the plan's QJSA. If the QJSA provides a spouse survivor annuity that is less than 75%, the QOSA must provide a spouse survivor annuity of 75%. If the QJSA spouse survivor annuity is greater than or equal to 75%, the QOSA must provide a spouse survivor annuity of 50%. Section 1107 of the PPA permits a plan sponsor to delay adopting a plan amendment pursuant to this provision until the last day of the first plan year beginning on or after January 1, 2009 (December 31, 2009 for calendar year plans).

The Notice clarifies that if a plan, both before and after the effective date of these changes, provides a spouse survivor annuity percentage that is equal to the spouse survivor annuity required to be provided under the QOSA, it need not be amended so that the optional joint and survivor annuity is designated as a QOSA and its administrative procedures need not be revised. The Notice also clarifies that the QOSA only needs to be the actuarially equivalent of the single life annuity for the life of the participant and that therefore, if a plan provides a QJSA that is more valuable than the plan's single life annuity, the QOSA need not be the actuarially equivalent of the plan's more valuable QJSA.

The Notice also provides that spousal consent is not required for the participant to elect to receive a distribution in the form of a QOSA as long as the QOSA is actuarially equivalent to the plan's QJSA, and that a plan is not required to offer participants a QOSA as an alternative to a qualified preretirement survivor annuity. It also provides that a plan can meet the QOSA written explanation requirement by treating it as an optional form of benefit available to participants under the plan and including it in its standard Code section 417 notice, and that it need not designate the optional form of benefit as a QOSA.

The Notice clarifies that the amendment saving provision of Section 1107 of the PPA does not provide relief from the requirements of Code section 411(d)(6). Thus, for example, an amendment that implements a QOSA (retroactive effective to January 1, 2008) may eliminate a distribution form or reduce or eliminate a subsidy with respect to a distribution form only to the extent such reduction or elimination is permitted under Code section 411(d)(6) and the applicable Treasury regulations.

The changes are effective for distributions with annuity starting dates in plan years beginning after December 31, 2007. However, in the case of a plan that is maintained pursuant to one or more collective bargaining agreements, the changes made by the PPA apply to distributions with annuity starting dates during plan years beginning on or after the earlier of:

- the later of January 1, 2008 or the date on which the last collective bargaining agreement terminates; or
- January 1, 2009.

For participants who elect a distribution with a retroactive annuity starting date, the Notice provides that the date of the first actual payment of the benefits based on the retroactive annuity starting date is substituted for the annuity starting date for purposes of applying these rules.

Interest Rates and Mortality Tables for Minimum Present Value Requirements

Code section 417(e)(3) provides rules for determining the present value of plan benefits for calculating plan cash-outs. Under these rules, the present value of plan benefits can not be less than the present value calculated by using the applicable mortality table and the applicable interest rate. For plan years beginning on or after January 1, 2008, the PPA changes these statutory assumptions by substituting interest rates and a mortality table used for plan funding for those currently used. Although effective for plan years beginning on or after January 1, 2008, Section 1107 of the PPA permits a plan sponsor to delay adopting a plan amendment until the last day of the first plan year beginning on or after January 1, 2009 (December 31, 2009 for calendar year plans).

The change in statutory assumptions may cause a reduction in a participant's accrued benefits. Normally, a plan amendment that causes such a reduction is prohibited by Code section 411(d)(6) but, pursuant to relief afforded by Rev. Rul. 2007–67, an amendment that implements the new interest rate and mortality assumptions that results in a reduction in accrued benefits, will not be a prohibited cut-back in violation of Code section 411(d)(6).

The Notice provides guidance as to the timing of plan amendments made in accordance with these changes to the statutory assumptions. A QJSA for a married participant must be at least as valuable as any other form of benefit payable under the plan at the same time. The Notice provides that a plan does not fail to satisfy this QJSA requirement merely because the plan is amended so that the amount payable under an optional form of benefit that is subject to the minimum present value requirement is calculated as the more favorable to participants of:

- the amount calculated by using the pre-PPA mortality table and interest rate; or

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- the amount calculated by using the post-PPA mortality table and interest rate.

If a plan is amended in this manner, but provides that benefits cease to be calculated by using the pre-PPA mortality table and interest rate after a specified period, the Notice also provides that the relief afforded by Rev. Rul. 2007–67 is still available. However, this relief only applies to the first plan amendment that implements the post-PPA interest or mortality tables. Any later amendment will not be treated as adopted pursuant to statutory provisions of the PPA.

Finally, the Notice provides that the relief afforded by Rev. Rul. 2007–67 is available for a plan amendment that replaces a plan reference to the pre-PPA required interest rate and mortality table with a reference to the post-PPA required interest rate and mortality table for benefit forms not subject to the Code section 417(e)(3) requirements, *e.g.* a term certain annuity.

Gap-Period Earnings

The final regulations under Code section 402(g) provide that for tax years beginning on or after January 1, 2007, a distribution of excess deferrals generally must include gap-period earnings. Under the Notice, a plan submitted to the IRS in the B remedial amendment cycle (February 1, 2007 – January 31, 2008) or the C remedial amendment cycle (February 1, 2008 – January 31, 2009) is required to provide for the distribution of gap-period earnings. A plan sponsor of a plan submitted before March 24, 2008, that does not provide for the distribution of gap-period earnings will be asked to amend the plan to include the distribution of gap-period earnings in order to receive a determination letter. Plans not in cycle B or C will not be required to adopt an interim plan amendment until the last day of the first plan year beginning on or after January 1, 2009 but, in operation, these plans must include gap-period earnings in the distribution of excess deferrals attributable to tax years beginning on or after January 1, 2007.

Although plan amendments adopting the distribution-related provisions addressed in the Notice generally are not required until the end of the 2009 plan year (or later for collectively bargained plans), immediate changes must be made to plan administration. Please contact us if you have any questions regarding the Notice.

FIRM NEWS

Saswati Paul will be speaking on *Fiduciary Responsibility Issues* at the Practicing Law Institute's Understanding ERISA 2008 Conference on July 22 in San Francisco.

Brad Huss and **Clarissa Kang** will be participating in the 25th Annual Conference On Employee Benefits of the San Francisco Chapter of the Western Pension & Benefit Conference on April 16. Brad will speak on *How to Conduct a 401(k) Fee Review*, and Clarissa will be moderating a session on *The New Landscape for ERISA Fiduciary Responsibility and Liability*.

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In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this *Benefits Report*.

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