

Policy Issues Alert

U.S. Supreme Court Rules Monetary Relief Is Available For Claim ERISA Fiduciary Breach Caused Losses To An Individual's 401(k) Plan Account

Robert W. Rachal
and Russell Hirschorn

PROSKAUER ROSE LLP

On February 20, 2008, in *LaRue v. DeWolff, Boberg & Associates, Inc.*, No. 06 Civ. 856, the U.S. Supreme Court concluded that a participant in a defined contribution pension plan may sue a fiduciary under Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(2), when the claim is that the fiduciary breach caused an individual loss to his 401(k) plan account. The Court determined that, when the plan at issue is a defined contribution plan, the number of participants affected or the percentage of plan assets at issue is irrelevant. This ruling expands the ERISA

Robert W. Rachal is Senior Counsel in Proskauer Rose's New Orleans office, where he practices in the Labor and Employment, Employee Benefits and Employee Benefits Litigation practice groups. Russell Hirschorn is an Associate in the Labor & Employment and Employee Benefits Litigation practice groups at Proskauer Rose LLP's New York City office.

fiduciary claims for which plaintiffs can potentially seek make-whole monetary relief. The ruling leaves several questions unanswered, however, and Justice Roberts' concurring opinion may reignite the debate over the applicability of ERISA's exhaustion requirement to fiduciary breach claims.

Background And Lower Courts' Decisions

LaRue was a participant in his employer's 401(k) plan; plan terms permitted him to direct his investments among a menu of investment options. LaRue alleged that the plan fiduciaries breached their fiduciary duties by failing to carry out his investment instructions, and that as a result his individual account balance was depleted by approximately \$150,000. The district court dismissed this claim, concluding that LaRue's requested monetary relief did not constitute "appropriate equitable relief" under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3).

On appeal, the Fourth Circuit Court of Appeals affirmed the district court's ruling on Section 502(a)(3), and also held that LaRue could not bring a new claim under Section 502(a)(2), which authorizes a civil action by a participant, beneficiary or fiduciary to recover losses to the plan. Relying on the Supreme Court's

decision in *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985), the Fourth Circuit reasoned that recovery under Section 502(a)(2) "must 'inure to the benefit of the plan as a whole,' not to particular persons with rights under the plan," and that LaRue was seeking only personal recovery for losses to his individual account.

Supreme Court's Decision

Although the Court's grant of *certiorari* included the Section 502(a)(3) issue, this issue was not addressed, as the five-judge majority opinion, authored by Justice Stevens, decided the case on Section 502(a)(2) grounds.

The Court acknowledged that the Fourth Circuit's decision was consistent with the Court's "plan as a whole" language in *Russell*, *supra*, but nevertheless concluded that the rationale for *Russell* supported LaRue's claim. *Russell* reasoned that Section 409 of ERISA, which is enforced through Section 502(a)(2), was focused on protecting plan assets from losses caused by fiduciary breaches. The *LaRue* Court observed that the "plan as a whole" requirement makes sense when the claim involves a defined benefit plan because, in that context, participants are being protected from "default risk" if the plan were unable to provide the promised defined benefit. In

contrast, in the defined contribution context (such as a 401(k) plan), losses to a few or to even one individual's account can result in the loss of benefits to participants.

Applying this distinction, the Court held that although Section 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." The majority pointed out that, while the record below was unclear as to the size of LaRue's plan account, its holding would be no different whether LaRue's account includes 1% or 99% of the plan's assets. The Court also made clear, however, that its ruling did not determine whether plan exhaustion or other defenses may apply to this claim.

There were two concurring opinions, both of which agreed that the Fourth Circuit erred. The concurrence of Chief Justice Roberts, joined by Justice Kennedy, is of particular interest because it stated that the Court's opinion did not decide whether this type of claim may be required to be brought as a claim for benefits under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132 (a)(1)(B). Chief Justice Roberts reasoned that when

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Please email the authors at rrachal@proskauer.com or rhirschorn@proskauer.com with questions about this article.

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world has known, not perfect, but better than any other system ever devised.

But nothing in life is free. I suggest that only by educating our legislators and our entire citizenry to the importance and benefits of our system of justice, and its dependence on infrastructure, judges and court personnel, do we lay the groundwork for appropriate funding. No other country in the world can match our court system for fairness, access, and the rule of laws rather than men. Our citizens and legislators need to know what they're getting for their money, so that they will want to pay a fair price for it.

Marc E. Williams, President Elect — Partner, Huddleston Bolen, West Virginia

In many states, the court system is so underfunded that parties seeking to resolve disputes are facing the prospects of waiting years to have their case heard, or incurring the cost of hiring private judges to resolve the matters for them. For most parties, neither option is preferable, but at what point is a party forced to abandon the hope that the system designed to deal with these disputes can function adequately any longer?

I am fortunate to practice in a state where, despite scarce resources, our political structure allows our court system to essentially set their own budget. With this luxury, however, comes the responsibility to act prudently in the expenditure of the people's money. In this respect, the courts in West Virginia are careful guardians of their budgetary responsibility. Our courts have carefully invested in order to maximize the efficiencies that come from new technology. This allows our courts to use these savings as a hedge against unlimited budget growth, or to fund new projects that advance the cause of justice.

Unfortunately, many state court systems are held hostage by political systems that require them to seek funding like any other administrative agency. This begging for appropriations belies the courts' status as a co-equal branch of government. The result is too often that underfunding occurs, programs are cut, not expanded or never instituted, good personnel leave for better paying jobs, jury trials are suspended for non-essential disputes, and the system begins to grind to a halt. Like pouring sand in the gears of a machine, the lack of funding for our courts prevents the system of justice from operating. And at what cost?

Our country was formed on the concept of justice. When courts are unable to function, when their essential operations are subject to a triage system where only the most severe matters are heard, the public will begin to doubt the ability of our system to deal with their problems. This doubt will evolve into a lack of confidence in our ability to hold our institutions accountable for their actions. It has always been the courts that did this, but if our courts are too feeble to act, who will?

Cary E. Hiltgen, First Vice President — Partner, Hiltgen & Brewer, Oklahoma

An independent judiciary is an essential element of America's system of government. It was established as a separate branch of government by the Article III of the United States Constitution. Justice

Stephen G. Breyer expressed the importance of an independent judiciary when he wrote, "We must keep in mind that judicial independence is a means toward a strong judicial institution. The strong judicial institution is a means toward securing the basic goals of people: human liberty and a reasonable level of prosperity."

The concept of an independent judiciary has been adopted by each state in some form. However, an independent judiciary is of little value to the citizens if it is intended to serve if the citizens do not have equal access to the independent judicial system.

The United States Constitution recognizes the importance of funding the judiciary by providing that judges, "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Without adequate funds, the judicial system cannot fulfill its role to provide for "human liberty and a reasonable level of prosperity." As a result, the "market" will begin allocating access to the independent judicial system.

The allocation may take the form of imposing additional fees on the parties for routine matters. For example, the U. S. Bankruptcy Courts now charge creditors \$150 just to file a motion to modify the automatic stay. It is not difficult to envision, based upon the current trends, future litigants being charged a fee to file a routine motion, such as summary judgment, or for an oral argument on any motion. This type of allocation of judicial resources results in providing access to the judicial system based on the ability of the party to pay.

Without adequate funding to provide adequate resources to an independent judiciary, it may be unable to provide prompt resolution of disputes. In some states, civil matters already take years to get to trial. To obtain a reasonably prompt resolution of their dispute, parties may seek a purely fee based system, such as arbitration or private judges, where the ability to pursue a claim is based on the party's ability to pay for resolution. While the parties may resolve their dispute promptly under a purely fee based system, the parties may be completely excluded from the established independent judicial system. Unfortunately, either of the above scenarios may result in more parties seeking "parking lot jurisprudence."

R. Matthew Cairns, Second Vice President — Shareholder, Ransmeier & Spellman, New Hampshire

There is something romantic about trying a case in a room with twenty foot ceilings, fans to move the air around the courtroom, heavy oak tables, wooden chairs at counsel table, and spindle back benches for those behind the bar. It is decidedly unromantic to try a case in a room without windows, Formica topped tables and plastic chairs for counsel, and little or no place for a gallery, let alone your witnesses in the courtroom. Too often, counsel are forced to perform in romantic and unromantic courtrooms and courthouses because state and local governments cannot provide a modern environment for today's litigants. As a direct result of under-funding of judicial infrastructure, the civil justice system risks being compromised.

In a struggling economic climate, state revenues fall. In turn, state agencies

and the judicial branch are being forced to make do with less than the year before or being denied the full increase in funding that they truly need (and what a legislature might want to give them in a perfect economy). Because human capital costs are the highest percentage of judicial budgets and difficult to cut absent attrition, court system administrative offices are often forced to cut back in infrastructure. New courthouse construction is being delayed, computer systems are not being upgraded and technology in a courtroom consists only of the BlackBerry that an attorney carries in her pocket.

I suspect that legislatures are as frustrated with not being able to give their sister branch of government what it needs as the Judicial Branch is in not receiving what is necessary to afford citizens their legal protections. In many states, like mine, the branches of government have come together to cooperatively address the negative impact of reduced revenues. However, if the economy continues to struggle, and state revenues continue to drop, such cooperation may be hard to find. If the judicial branch is on the losing end of that struggle, we will all lose. Courtrooms will be overcrowded, facilities will not be able to accommodate the needs of modern litigants, judges and clerks will be unable to use technology to its fullest potential, good people will not want to become judges to work under those conditions, and justice will be denied to plaintiffs and defendants alike. The time to think about how to adapt to this potentiality is now - for litigants, legislators and the judiciary — and it will take a cooperative effort to ensure that our justice system serves all equally regardless of our economy.

Paul M. Lavelle, Secretary Treasurer — Shareholder, Abbott Simses & Kuchler, New Orleans

Having just completed a five week long civil jury trial in a rural Court, I have recent first-hand experience with funding issues. Aside from the fact that much of the trial took place in a small basement courtroom, two incidents during that trial are indicative of the environment underfunding creates. First, the jurors are permitted to take notes during trial and are provided with notepads, which are secured and ultimately destroyed by the court upon conclusion

of the trial. Upon seating the jury, the Judge called upon the deputy to distribute notepads, only to learn that the clerk's office did not provide the funding for notepads and thus there were none available. The problem was solved by the lawyers for all parties collectively providing legal pads from their own supplies. Later in the trial, the law clerk charged with drafting the jury instructions informed us that the courts computer system was not up to date enough to allow us to email courtesy copies of suggested jury instructions nor was the capability to download referenced cases from the Internet or legal databases available. We were ordered to provide a CD with our suggested instructions and photocopies of the cited cases.

Although these two incidents appear insignificant, they reflect and even underscore the fact that the burden of expense of civil trials will increasingly be put on the parties. Our courts are funded, in part, by civil case filing fees and those fees fund not just the civil justice system but the criminal justice system as well. When that money is not allocated to the civil system, the burden is increasingly passed on to the litigants. More specifically, since the costs are usually allocated to the defendant company at the conclusion of a case, whether following a loss at trial or as a requirement to have a dismissal order signed after settlement, it is business that bears the costs of funding the system. In addition to the problems recognized by DRI's Judicial Task Force relative to adequate funding, such as personnel, case backlogs, infrastructure and ultimately, access to justice, we are also faced with presenting our clients with higher bills for their legal work because of both increased court costs and the additional time expended by attorneys tending to matters that should be handled by court staff.

Although the Judicial Task Force Recommendations are well made and should be acted upon, we need to realize that even where successful, it will be some time before change is implemented. Therefore, I believe we also should partner with our business clients to help them meet the challenges of these increasing expenses. It is my belief that we not only need to strive to end the erosion of funding for state judicial systems but also engage our clients in alternative means of taking control of their civil litigation expenses.

Monetary Relief

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the right to issue arises under the plan terms, as it did here, then such a claim would appear to fall naturally under Section 502(a)(1)(B). Chief Justice Roberts was animated by the concern that, if this type of claim were nonetheless allowed to be pursued under Section 502(a)(2), it may bypass the safeguards of plan exhaustion and deference to plan administrators applicable to claims for benefits under Section 502(a)(1)(B).

Implications For Plan Sponsors And Fiduciaries

The Court's ruling expands the potential ERISA fiduciary claims for which individual plaintiffs can seek make-whole economic relief. If plaintiffs can show that

the breach caused a loss or diminution of plan assets allocated to an individual's 401(k) or other defined contribution account, the majority's opinion suggests that such a claim typically may be brought under Section 502(a)(2). This does not mean that all fiduciary breach claims may be fit under Section 502(a)(2), however, since many claims do not involve the loss of plan assets, or involve breaches that caused participants to lose benefits otherwise due from the plan. Finally, Chief Justice Roberts' concurrence opens the door to the possibility that, when the right to issue arises under the plan terms, not ERISA, these claims may be required to be brought subject to the rules and procedures applicable to claims for benefits under Section 502(a)(1)(B), including potentially, the exhaustion of plan administrative remedies.