

Supreme Court Will Hear Case That Denied Relief for 401(k) Account Losses Allegedly Due to Fiduciary Breach

On June 18, 2007, the U.S. Supreme Court granted certiorari (cert.) in the case of *LaRue v. DeWolff, Boberg & Associates, Inc.* (450 F.3d 570 (4th Cir. 2006), cert. granted (U.S. June 18, 2007) (No. 06-856)). In June 2006, the U.S. Court of Appeals for the Fourth Circuit in *LaRue* upheld a U.S. District Court's ruling that neither ERISA Section 502(a)(2) nor Section 502(a)(3) permits an individual participant to bring an action to recover losses attributable to a failure on the part of 401(k) plan fiduciaries to carry out a participant's investment directions or to bring an action to be made whole for such losses as a matter of equity. In what may be another landmark case on ERISA remedies, the Supreme Court, by granting cert., has in effect agreed to decide whether defined contribution plan participants have a right to monetary relief when a fiduciary breach in violation of ERISA caused them to lose value in their plan accounts. The Court has scheduled oral argument for the fall of 2007.

In *LaRue*, the plaintiff worked for a nationwide management consulting firm that sponsored a 401(k) plan. The firm was the plan administrator. In 2001 and 2002, the plaintiff allegedly directed the firm to make certain investment changes in his plan account, but those directions were apparently not implemented. In 2004, the plaintiff sued the firm (in its capacity as an ERISA fiduciary) and the plan, claiming breach of fiduciary duty. The plaintiff argued that he had lost \$150,000 in his 401(k) account as a result of the fiduciary breach and sought recovery of this loss under ERISA. The U.S. District Court for the District of South Carolina dismissed the plaintiff's claims on the grounds that they did not request a form of relief available under ERISA. The Fourth Circuit affirmed.

ERISA Section 502(a)(2) permits a civil action by a participant "for appropriate relief" with respect to a breach of fiduciary duty under ERISA Section 409(a). Section 409(a) provides that a fiduciary "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach..." The appellate court ruled that the plaintiff's claim did not allow recovery under this ERISA subsection because it provides remedies only for entire plans and the recovery must inure to the benefit of the plan as a whole. In contrast, the court reasoned, the plaintiff's recovery of losses would benefit his individual plan account only.

The appellate court also rejected the plaintiff's claims under ERISA Section 502(a)(3), which provides for civil actions by a participant to obtain "equitable relief" to redress ERISA violations. The appellate court determined that the remedy sought by the plaintiff fell outside of the scope of equitable relief available under this ERISA subsection. In reaching this conclusion, the court cited the Supreme Court's 1993 ruling in *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S. Ct. 2063. According to the appellate court, the Supreme Court in *Mertens* concluded that "equitable relief" under Section 502(a)(3) refers only to the narrow types of relief that were historically available in a court of equity, such as injunctions and restitution, and not remedies that were available in a court of law, such as compensatory damages. The court determined that the plaintiff in *LaRue* was actually

seeking compensatory damages for the ERISA breach, rather than equitable remedies that would otherwise be available under Section 502(a)(3).

With regard to the first question presented, LaRue's petition for writ of certiorari argued that the Fourth Circuit's decision creates a conflict with federal appeals court decisions that have allowed participants to sue under Section 502(a)(2) to recover losses to an ERISA plan that were caused by fiduciary breaches even though the participants would benefit from the recovery. Regarding the second question, while the Fourth Circuit's ruling appears to be consistent with a majority of the circuit courts, it would be helpful to obtain the Supreme Court's review of the scope of 502(a)(3) and its analysis of why that provision does or does not authorize participants to recover monetary losses caused by a fiduciary breach.

This case is being closely watched by the benefits community. The Supreme Court invited the Solicitor General to express the views of the United States as to the petition for writ of certiorari. In response, the Solicitor General filed an amicus curiae brief in which he took the position that the appellate court decided the issues under both ERISA Section 502(a)(2) and (a)(3) incorrectly. The Solicitor General went so far as to say that the Fourth Circuit's interpretation of Section 502(a)(2) would leave even the Secretary of Labor without the ability to recover losses caused by fiduciary breaches in states subject to the Fourth Circuit's ruling with respect to individual accounts in defined contribution plans, including cases involving the failure to forward employee contributions to such plans. The U.S. Department of Labor has also expressed opposition to the Fourth Circuit's *LaRue* ruling. In an amicus brief it wrote in support of the plaintiff's petition for a rehearing of *LaRue*, the Labor Department argued that relief is available under ERISA Section 502(a)(2) for fiduciary breach claims brought by individual account plan participants, "even though the ultimate effect of relief to the plan would be to increase the balance" in a participant's individual account.