

# Client Alert

A report  
for clients  
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of the Firm     June 2007

## U.S. Supreme Court To Consider Available Remedies Under ERISA

On June 18, 2007, the U.S. Supreme Court granted *certiorari* in the case of *LaRue v. DeWolff, Boberg & Associates, Inc.*, No. 06 Civ. 856, thereby agreeing to consider hotly contested issues surrounding the scope of relief available to 401(k) plan participants under the Employee Retirement Income Security Act of 1974 (ERISA). Depending on the path chosen, the Supreme Court may resolve the issue of whether such participants can obtain monetary relief for investment losses under Section 502(a)(2) of ERISA, which governs claims for fiduciary breach on behalf of plans and their participants; under Section 502(a)(3) of ERISA, which authorizes suits for equitable relief to remedy statutory violations; or under neither statutory provision.

### District Court's Decision

LaRue was a participant in his employer's 401(k) retirement savings plan where he was permitted to manage his own account by selecting from a menu of investment options. LaRue's complaint alleged that the plan fiduciaries breached their fiduciary duties by failing to carry out his investment instructions, and that as a result his interest in the plan was depleted by approximately \$150,000. LaRue asserted his principal claim under Section 502(a)(3), which authorizes an action by a participant, beneficiary, or fiduciary to obtain other "appropriate equitable relief." 29 U.S.C. § 1132(a)(3).

The district court granted defendants' motion for judgment on the pleadings, finding that LaRue failed to state a cognizable claim for "appropriate equitable relief" under Section 502(a)(3). Relying on the Supreme Court's decision in *Great-West Life and Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the district court determined that LaRue's claim sought nothing more than impermissible monetary damages because the monetary relief sought by

LaRue was not in the form of money that already belonged to him but rather was in the form of lost investment opportunities.

### Fourth Circuit's Decisions

On appeal, LaRue for the first time attempted to assert a claim under Section 502(a)(2) of ERISA, which authorizes a civil action by a participant, beneficiary or fiduciary to recover plan losses resulting from a breach of fiduciary duty. The Fourth Circuit Court of Appeals rejected this argument, holding that, that even if the claim were not waived, it would not be actionable because recovery under this subsection "must 'inure to the benefit of the plan as a whole,' not to particular persons with rights under the plan," and LaRue was seeking only personal recovery (citing *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985)). In so ruling, the Court distinguished those cases that permitted individual account plan participants to sue, either on behalf of a class or on behalf of the plan, under Section 502(a)(2), reasoning that in those cases the potential recovery was not limited to the individual plaintiff who brought the lawsuit.

Turning to LaRue's claim under Section 502(a)(3), the Court rejected LaRue's argument that the "make whole" relief he sought constituted a form of "other appropriate equitable relief" within the meaning of Section 502(a)(3). In addition, the Court rejected LaRue's argument that his claim was analogous to a common law breach of trust action by a beneficiary seeking to recover lost trust profits — a claim that trust treatises have labeled as providing "equitable" relief. In so holding, the Court concluded that scope of relief available under Section 502(a)(3) does not include all remedies that an equity court could have awarded by virtue of its jurisdiction over the claim at issue.

LaRue thereafter petitioned for rehearing *en banc*, and was supported in these efforts by the Secretary of Labor, who filed an amicus brief. The Fourth Circuit denied LaRue's motion for rehearing, but considered the Secretary's arguments. In response to those arguments, the Court concluded that there was nothing in the

statute that provided for an individual claim to be asserted for the benefit of the plan; and that, contrary to the Secretary's assertions, its holding to that effect did not create an inter-circuit conflict since all of the cases cited by the Secretary involved a subset of participants and beneficiaries who alleged plan losses, whereas this case involved an individual plaintiff alleging individual losses.

### Supreme Court Grant of *Certiorari*

LaRue thereafter petitioned for *certiorari* before the Supreme Court. In response to the petition, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States. The Solicitor General opined that the Fourth Circuit erred in rejecting both the Section 502(a)(2) claim and the Section 502(a)(3) claim, and observed that the courts of appeals were divided with respect to both issues. Furthermore, the Solicitor General contended that, in light of ERISA's broad preemption provision, the Fourth Circuit's decision "threatens to leave many plan participants without any effective redress for breaches of ERISA's fiduciary duties."

With respect to LaRue's claim under Section 502(a)(2), the Solicitor General argued that it was irrelevant whether the suit is brought by a class or subset of plan participants rather than a single participant because, "[a]lthough the number of affected participants differs, the nature of the relief — the payment of money to the plan — is the same whether the recovery is allocated to the account of one participant, a number of participants, or every participant in the plan." As for the claim under Section 502(a)(3), the Solicitor General argued, *inter alia*, that in an action for breach of trust equity provided a variety of remedies, including a "surcharge" on the trustee in "the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." Thus, according to the Solicitor General, a suit against a fiduciary to recover losses caused by a breach of fiduciary duty necessarily seeks "equitable relief" under Section 502(a)(3).

### Implications for Plan Sponsors and Fiduciaries

The Supreme Court's granting of *certiorari* will enable the Court, if it chooses, to resolve many of the significant issues that have divided the appellate and lower courts since the Supreme Court's decision in *Great-West*, and in particular, the issues associated with claims by 401(k) plan participants to recover investment losses resulting from alleged breaches of fiduciary duty. The uncertainty as to how the Court will rule is compounded by the fact that: (i) *Great West* was decided 5-4 with a strong dissent by Justice Ginsberg; and (ii) two of the Justices who joined in the majority decision have since been replaced. Whether or not the new Court will address all the

issues presented remains to be seen. The Court could, for example, conclude that LaRue waived his claim under Section 502(a)(2), limit the substance of its decision to LaRue's claim under Section 502(a)(3), and rule with respect to that claim on narrow grounds.

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