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***LaRue v. DeWolff, Boberg & Associates, Inc.:* Investing More ERISA Fiduciary Breach Protection for Individuals' Retirement Plans**

I. INTRODUCTION

In early 2008, the United States Supreme Court handed down the unanimous decision of *LaRue v. DeWolff, Boberg & Associates, Inc.*,¹ which clarified recovery under sections 409(a) and 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA)² for individual accounts within defined contribution plans harmed by fiduciary breaches.³ Prior to *LaRue*, some courts had interpreted the Supreme Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*⁴ to mean that individual participants could not recover for harm caused by fiduciary breaches unless the entire plan suffered losses and

1. 128 S. Ct. 1020 (2008).

2. Pub. L. No. 93-406, §§ 409(a), 502(a)(2), 88 Stat. 829, 886, 891 (1974) (codified as amended at 29 U.S.C. §§ 1109(a), 1132(a)(2) (2006)).

3. See *LaRue*, 128 S. Ct. at 1026.

4. 473 U.S. 134 (1985).

would benefit from recovery.⁵ However, the Court's decision in *LaRue* provides enhanced protection for individual account holders of defined contribution plans by allowing recovery under section 502(a)(2) for fiduciary breaches that harm only a particular individual's account.⁶ Such an expansion of protection will prove crucial as an aging American population and failing Social Security system require American employees to take more individual responsibility for their own retirement accounts and planning.

II. FACTUAL BACKGROUND

The essence of the dispute in *LaRue v. DeWolff, Boberg & Associates, Inc.*⁷ was a claim for breach of fiduciary duty.⁸ DeWolff, Boberg & Associates, Inc. (DeWolff) was the former employer of the petitioner, James LaRue. While employed by DeWolff, LaRue participated in a 401(k) retirement savings plan, which was regulated by the Employee Retirement Income Security Act of 1974 (ERISA).⁹ DeWolff administered the 401(k) savings plan, thus acting as the fiduciary for the plan.¹⁰

The DeWolff 401(k) plan provided certain procedures and requirements through which participants were permitted to direct the plan administrator to invest the participants' contributions. In 2001 and 2002, LaRue directed DeWolff, as the plan administrator, to make certain changes to the investment allocations of his individual 401(k) account. DeWolff never carried out LaRue's directions. DeWolff's failure depleted the value of LaRue's individual account by approximately \$150,000. LaRue filed an action against DeWolff in the United States District Court for the District of South Carolina, claiming that DeWolff breached its fiduciary duty under ERISA. Using section 502(a)(3),¹¹ LaRue sought equitable relief to make whole his individual account, as well as any other just and proper relief.¹²

5. See, e.g., *Coan v. Kaufman*, 457 F.3d 250, 257 (2d Cir. 2006) (determining that the plaintiff's action was specious because the claim failed to benefit the entire plan).

6. See 128 S. Ct. at 1026.

7. 128 S. Ct. 1020 (2008).

8. *Id.* at 1023.

9. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 29 U.S.C. (2006)).

10. *LaRue*, 128 S. Ct. at 1022-23.

11. Pub. L. No. 93-406, § 502(a)(3), 88 Stat. 829, 891 (1974) (codified as amended at 29 U.S.C. § 1132(a)(3) (2006)).

12. *LaRue*, 128 S. Ct. at 1022-23. The plaintiff's complaint specifically requested "appropriate 'make whole' or other equitable relief pursuant to E.R.I.S.A. 29 U.S.C.S. § 1132(a)(3)." Complaint at ¶ 18, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, No. 2:04-1747-

In the district court, DeWolff filed a motion for judgment on the pleadings, arguing that the claim was essentially for monetary relief, which is unavailable under section 502(a)(3). LaRue countered that his claim did not request a monetary award to him as an individual.¹³ Instead, he argued that the claim simply requested an adjustment to his individual account value to “properly reflect” the value of his account had DeWolff not breached its fiduciary duty.¹⁴

The district court found that DeWolff did not wrongfully possess any funds that belong to LaRue. Therefore, it concluded that LaRue sought damages rather than equitable relief, and no remedy for damages was available to him under section 502(a)(3) even if DeWolff did breach its fiduciary duty. The district court granted DeWolff’s motion for judgment on the pleadings.¹⁵

LaRue then appealed to the United States Court of Appeals for the Fourth Circuit, renewing his claim under section 502(a)(3). He also argued that he had a valid section 502(a)(2)¹⁶ claim for breach of fiduciary duty. The court of appeals characterized the remedy that LaRue sought as inuring to the individual beneficiary, since any funds recovered would benefit only his individual account. The court recognized that LaRue’s recovery could, in a narrow sense, be construed as accruing to the entire plan, since his individual account is part of the entire plan. However, the court refused to accept this interpretation because it was unsupported by the statutory text and contrary to the legislative purpose of these sections. Reasoning that LaRue’s remedy would not actually benefit the entire plan, the court of appeals refused to recognize his individual claim as a proxy for a claim on behalf of the entire plan. Even though LaRue raised the section 502(a)(2) claim for the first time on appeal,¹⁷ the court rejected it on the merits. The court of appeals also rejected LaRue’s section 502(a)(3) claim, agreeing with the district court’s finding that his remedy would not be equitable in nature.¹⁸

18, 2004 WL 5338152 (D.S.C. Apr. 1, 2004). The district court interpreted this language as requesting relief only under section 502(a)(3) and not primarily pursuant to section 502(a)(2) as the plaintiff likely intended by including language similar to section 502(a)(2). See *LaRue*, 128 S. Ct. at 1023.

13. *LaRue*, 128 S. Ct. at 1023.

14. *Id.*

15. *Id.*

16. Pub. L. No. 93-406, § 502(a)(2), 88 Stat. 829, 891 (1974) (codified as amended at 29 U.S.C. § 1132(a)(2) (2006)).

17. See *supra* note 12.

18. *LaRue*, 128 S. Ct. at 1023.

The United States Supreme Court granted LaRue's petition for certiorari on both claims.¹⁹ The Court did not address the section 502(a)(3) claim because it concluded that the court of appeals erred in its reading of both the statutory text and *Massachusetts Mutual Life Insurance Co. v. Russell*.²⁰ Therefore, the Court vacated the court of appeals decision and remanded the case in a unanimous judgment with two concurring opinions.²¹

III. LEGAL BACKGROUND

A. ERISA Passage

Congress passed ERISA²² following substantial growth in the number and size of private pension plans in the United States.²³ While the prevalence of these private retirement plans grew exponentially in the United States following World War II, the government was slow to pass any comprehensive regulatory schemes.²⁴ In fact, much of the regulation that predated ERISA only dealt with pension plans in a piecemeal manner.²⁵ Thus, Congress's purpose in passing ERISA was to provide for a comprehensive regulatory scheme for private pensions without impeding their growth.²⁶

Much of this legislation was aimed at providing protection for the plan and its beneficiaries from fiduciary breaches and general mismanagement.²⁷ For instance, Part IV of ERISA²⁸ is dedicated to defining the scope of fiduciary responsibilities.²⁹ Meanwhile, Part V of ERISA³⁰ outlines criminal, civil, and administrative enforcement for violations of

19. *Id.*

20. *Id.*; 473 U.S. 134 (1985).

21. *LaRue*, 128 S. Ct. at 1026.

22. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 29 U.S.C. (2006)).

23. S. Rep. No. 93-127 (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4840.

24. *See id.*

25. *See id.*

26. *See id.* at 4844-47.

27. *See id.* at 4838, 4847, 4864-72; see generally Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1101-14, 1131-48 (2006)).

28. Pub. L. No. 93-406, §§ 401-14, 88 Stat. 829, 874-89 (1974) (codified as amended at 29 U.S.C. §§ 1101-14 (2006)).

29. *See id.*

30. Pub. L. No. 93-406, §§ 501-14, 88 Stat. 829, 891-897 (1974) (codified as amended at 29 U.S.C. §§ 1131-48 (2006)).

the Act.³¹ More specifically, section 409(a)³² provides in pertinent part:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate³³

Section 502(a)(2)³⁴ states, “A civil action may be brought . . . by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title.”³⁵ As the text of section 502(a)(2) suggests, Congress meant for these sections to be read together to impose personal fiduciary liability and a remedy for breaches of fiduciary duties.³⁶

Congress’s major concern in enacting the fiduciary standards and liability portion of ERISA was to protect the “financial integrity of [retirement] plan[s],”³⁷ and, by extension, the individual beneficiaries of those plans.³⁸ By including these sections in the ERISA regulatory scheme, Congress intended to prevent fiduciary mismanagement of plan assets, whether caused by intentional improprieties or incompetence.³⁹ However, many courts, following the lead of the United States Supreme Court in *Massachusetts Mutual Life Insurance Co. v. Russell*,⁴⁰ have interpreted these statutory provisions as providing relief only to the plan as a whole, rather than to individual beneficiaries.⁴¹

B. The Supreme Court’s Interpretation of Sections 409(a) and 502(a)(2) in Massachusetts Mutual Life Insurance Co. v. Russell

The Supreme Court substantially examined and interpreted the text of sections 409(a) and 502(a)(2) for the first time in *Massachusetts*

31. *See id.*

32. Pub. L. No. 93-406, § 409(a), 88 Stat. 829, 886 (1974) (codified at 29 U.S.C. § 1109(a) (2006)).

33. *Id.*

34. Pub. L. No. 93-406, § 502(a)(2), 88 Stat. 829, 891 (1974) (codified as amended at 29 U.S.C. § 1132(a)(2) (2006)).

35. *Id.* Section 1109 is referring to the codification of ERISA § 409 in Title 29 of the United States Code.

36. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 139-40 (1985).

37. *Id.* at 142 n.9.

38. *See id.*

39. *See id.* at 140 n.8.

40. 473 U.S. 134 (1985).

41. *See id.* at 144.

Mutual Life Insurance Co. v. Russell,⁴² which involved the improper processing of benefit claims.⁴³ The Court held that section 409(a) does not provide for extra-contractual damages caused by a breach of fiduciary duty.⁴⁴ The Court acknowledged that a beneficiary may bring an action pursuant to section 502(a)(2) to recover for a section 409(a) violation.⁴⁵ However, the Court explained that any recovery under such an action must “inure[] to the benefit of the plan as a whole.”⁴⁶ This latter language has led to much confusion in ERISA litigation.⁴⁷

The *Russell* litigation began in California Superior Court, where the respondent brought several state law claims and ERISA claims against the petitioner. After the petitioner removed the case to the United States District Court for the Central District of California, the court granted the petitioner’s motion for summary judgment. The district court determined that ERISA preempted the state claims, and held that ERISA barred all extra-contractual or punitive damages that resulted from a fiduciary breach and would have been paid to the individual beneficiary.⁴⁸

On appeal, the United States Court of Appeals for the Ninth Circuit agreed that the respondent’s state law claims were preempted by ERISA. However, the court held that ERISA, itself, afforded the respondent a viable claim. The court determined that the petitioner violated its fiduciary duty regarding diligent, good faith claim processing by taking 132 days to process the respondent’s benefit claim. According to the court, the petitioner’s actions constituted a section 409(a) violation. Therefore, the respondent, a plan beneficiary, could assert the claim pursuant to section 502(a)(2).⁴⁹

The court of appeals reasoned that the text of section 409(a) gave broad discretion to courts to determine the remedies to be awarded, even including punitive and compensatory damages. The court held that the availability of compensatory damages to the individual beneficiary extends beyond just contractual damages—such as losses to plan benefits—to include extra-contractual losses, provided they were a

42. 473 U.S. 134 (1985).

43. *Id.* at 136.

44. *Id.* at 148.

45. *Id.* at 140.

46. *Id.*

47. See Michael R. Maryn, *What’s New In Employee Benefits: A Summary Of Current Case And Other Developments*, (ALI-ABA Course of Study, Mar. 28-30, 2007), WL SM079 ALI-ABA 1, 96-102.

48. *Russell*, 473 U.S. at 137. The fiduciary breach here was the petitioner’s denial of the respondent’s original claim for benefits under the plan. *Id.*

49. *Id.* at 137-38.

proximate cause of the fiduciary breach.⁵⁰ The court explained that “liability under § 409(a) ‘is against the fiduciary personally, not the plan.’”⁵¹ The court also believed that the perceived purpose of section 409(a), to provide broad remedies to restore victims and deter violations, allowed for punitive damages, but only when the fiduciary’s acts were egregious.⁵²

The Supreme Court granted certiorari to examine the court of appeals holding that extra-contractual compensatory and punitive damages could be recovered for fiduciary breaches under section 409(a).⁵³ The Court held that extra-contractual damages for the individual beneficiary are not authorized by section 409(a).⁵⁴ The Court did not see any express authority for such recovery in the text of section 409(a) or any congressional intent to support the court of appeals holding.⁵⁵

Further, the Court pointed out that the court of appeals employed the “blue pencil” method of statutory interpretation.⁵⁶ The lower court had ignored parts of the statutory text during interpretation, which significantly changed the meaning of section 409(a) to create broader forms of relief.⁵⁷ Instead, the Court determined that when the text of section 409(a) is read as a whole, the congressional intent was clearly to provide “remedies that would protect the *entire plan*, rather than . . . the rights of an individual beneficiary.”⁵⁸ Moreover, the Court pointed out that section 502(a)(2), which provides enforcement for section 409(a) violations, authorizes suits by plaintiffs with only one common interest—protecting the financial integrity of the entire plan.⁵⁹ Finally, the duties ERISA imposes on the fiduciary are primarily directed at the plan, and only secondarily directed to protect the interests of participants and beneficiaries by ensuring that they receive plan-authorized benefits.⁶⁰

50. *Id.* at 138.

51. *Id.* (quoting *Russell v. Mass. Mut. Life Ins. Co.*, 722 F.2d 482, 490 n.8 (1983)).

52. *Id.*

53. *Id.*

54. *Id.* at 148.

55. *Id.* at 144.

56. *Id.* at 142. The Court defined “blue pencil” statutory interpretation as “omitting all words not part of the clauses deemed pertinent to the task at hand.” *Id.*

57. *Id.* at 141-42.

58. *Id.* at 142 (emphasis added).

59. *Id.* at 142 n.9.

60. *Id.* at 142-43.

C. *Confusion Following the Russell Decision*

The Supreme Court's decision in *Russell* caused considerable confusion for lower courts attempting to determine claims and relief available under sections 409(a) and 502(a)(2).⁶¹ After *Russell* courts struggled to determine whether ERISA provided a valid claim or remedy for breaches of fiduciary duty that do not result in losses to the entire plan but adversely affect only an individual or subset of participant accounts.⁶² Differing circuit interpretations reflect the difficulty encountered by lower courts regarding the application of *Russell* to ERISA in determining claims and remedies for fiduciary breaches.⁶³

After *Russell* some circuits recognized a claim for fiduciary breaches that did not harm the entire plan.⁶⁴ For instance, in *Kuper v. Iovenko*,⁶⁵ the United States Court of Appeals for the Sixth Circuit agreed that a fiduciary breach may harm only an individual or subset of plan participants and still give rise to a valid claim.⁶⁶ Although a plaintiff need not bring the claim as a representative of all plan participants, the court determined that the statutory text requires any recovery to the individual to be paid into the plan.⁶⁷ The United States Court of Appeals for the Third Circuit followed suit in *In re Schering-Plough Corp. ERISA Litigation*.⁶⁸ In that case, the Third Circuit distinguished *Russell* and reasoned that the text of section 409(a) did not preclude recovery just because the assets that were harmed by the fiduciary breach would ultimately benefit the plaintiffs, as opposed to all plan participants.⁶⁹ The court recognized that these assets, although earmarked for individual accounts, were still plan assets and thus the entire plan was harmed.⁷⁰ District courts in the Seventh and Eleventh Circuits also joined this trend.⁷¹ Most recently, in *Milofsky v. American Airlines, Inc.*,⁷² the United States Court of Appeals for the Fifth Circuit

61. See Maryn, *supra* note 47, at 96-102.

62. *Id.* at 101.

63. See *id.*

64. *Id.*

65. 66 F.3d 1447 (6th Cir. 1995).

66. *Id.* at 1452-53.

67. *Id.*

68. 420 F.3d 231 (3d Cir. 2005).

69. *Id.* at 235 n.4.

70. *Id.* at 235.

71. See *Rogers v. Baxter Int'l, Inc.*, 417 F. Supp. 2d 974, 982 (N.D. Ill. 2006); *Woods v. Southern Co.*, 396 F. Supp. 2d 1351, 1361-63 (N.D. Ga. 2005).

72. 442 F.3d 311 (5th Cir. 2006) (en banc) (per curiam).

recognized a claim for fiduciary breach even though the whole plan was not affected.⁷³

The United States Court of Appeals for the Second Circuit interpreted *Russell* and the statutory text to require a fiduciary breach to harm the entire plan;⁷⁴ thus, a plaintiff had to seek to represent and benefit all plan participants to have a valid section 502(a)(2) claim.⁷⁵ For instance, in *Coan v. Kaufman*,⁷⁶ the Second Circuit dismissed the plaintiff's section 502(a)(2) claim because it was not brought on behalf of other plan participants.⁷⁷ Additionally, the United States Court of Appeals for the Fourth Circuit adopted the same interpretation, as evidenced by its decision in *LaRue v. DeWolff, Boberg & Associates, Inc.*⁷⁸ The court relied on *Russell* in determining that section 502(a)(2) requires a remedy for the entire plan.⁷⁹ Therefore, the court determined that a claim will fail when an individual account suffers the only loss in the plan because the individual plaintiff's interest in recovery does not "serve as a legitimate proxy for the plan in its entirety."⁸⁰ In response to the circuit split regarding the interpretation of ERISA section 502(a)(2), the Supreme Court granted certiorari.⁸¹

IV. COURT'S RATIONALE

A. *Majority Opinion*

Justice Stevens, joined by Justices Souter, Ginsburg, Breyer, and Alito, delivered the majority opinion.⁸² The United States Supreme Court first clarified that its holding in *Massachusetts Mutual Life Insurance Co. v. Russell*⁸³ concerned the rights of individual beneficiaries to a defined benefit plan to bring section 502(a)(2)⁸⁴ claims to recover consequential damages for fiduciary breaches.⁸⁵ The Court emphasized that *Russell* was decided when defined benefit plans dominated the

73. *Id.* at 313.

74. *Coan v. Kaufman*, 457 F.3d 250, 257 (2d Cir. 2006).

75. *See id.*

76. 457 F.3d 250 (2d Cir. 2006).

77. *Id.* at 257.

78. 450 F.3d 570, 573-74 (4th Cir. 2006), *rev'd*, 128 S. Ct. 1020 (2008).

79. *Id.* at 574.

80. *Id.*

81. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1023 (2008).

82. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1021 (2008).

83. 473 U.S. 134 (1985).

84. Pub. L. No. 93-406, §§ 502(a)(2), 88 Stat. 829, 891 (1974) (codified as amended at 29 U.S.C. § 1132(a)(2) (2006)).

85. *LaRue*, 128 S. Ct. at 1022.

retirement landscape but subsequently became eclipsed by defined contribution plans.⁸⁶

The Court stated that the “entire plan” language from *Russell*, which had caused so much confusion and upon which the United States Court of Appeals for the Fourth Circuit relied in the case at bar, should be limited to the operation of section 409(a)⁸⁷ on defined benefit plans.⁸⁸ Accordingly, a fiduciary breach does not affect an individual participant unless the breach creates a default risk for the *entire plan*.⁸⁹ Following this logic, the Court interpreted section 409(a) as protection for the entire plan because the fiduciary’s duties ran to the plan as a whole.⁹⁰ This interpretation found support in legislative history that suggested these sections were meant to protect the plan from fiduciary misconduct.⁹¹ Additionally, congressional concern about default risk to defined benefit plans, but not to defined contribution plans, is further evidenced by funding and insurance requirements that ERISA imposes only on defined benefit plans.⁹² The Court concluded that the “entire plan” language, while properly limiting claims by participants in defined benefit plans, has been misapplied by lower courts to defined contribution plans.⁹³

The Court also distinguished the types of relief sought in *Russell* from those sought in *LaRue*.⁹⁴ The plaintiff in *Russell* sought consequential damages in addition to the benefits that she had already received under the plan contract.⁹⁵ The Court noted that sections 409(a) and 502(a)(2) do not provide for recovery of such damages.⁹⁶ However, the petitioner in *LaRue* simply sought to recover losses to his individual account in the plan caused by the fiduciary breach.⁹⁷ The Court emphasized that this misconduct and, by extension, recovery, “falls squarely within [the statutory sections].”⁹⁸ Thus, the Court narrowly framed the issue in *LaRue* as whether the statutes allow a defined contribution plan

86. *Id.* at 1025.

87. Pub. L. No. 93-406, § 409(a), 88 Stat. 829, 886 (1974) (codified at 29 U.S.C. § 1109(a) (2006)).

88. *LaRue*, 128 S. Ct. at 1025.

89. *Id.*

90. *Id.* at 1024.

91. *Id.*

92. *Id.* at 1025.

93. *See id.*

94. *Id.* at 1024.

95. *Id.*

96. *Id.*

97. *Id.* at 1023.

98. *Id.* at 1024.

participant to sue for losses to his individual plan account that were caused by fiduciary misconduct.⁹⁹

The Court then explored the effects of a fiduciary breach in defined contribution plans and recognized that an individual's benefits may be substantially lowered without adverse threat to the solvency of the entire plan.¹⁰⁰ Even though the misconduct affects only individual accounts, the Court determined that Congress intended to address this type of harm with sections 409(a) and 502(a)(2).¹⁰¹ Furthermore, the individual account's proportion of the plan as a whole is inconsequential in determining whether a section 502(a)(2) claim lies.¹⁰² According to the majority, the "entire plan" language in *Russell* does not limit section 409(a) liability in the defined contribution, as opposed to the defined benefit, context.¹⁰³

The Court held that a plaintiff may recover "for fiduciary breaches that impair the value of plan assets in a participant's individual account," pursuant to sections 409(a) and 502(a)(2).¹⁰⁴ On the other hand, the Court maintained that these sections do not provide a claim to recover for individual injuries outside of the plan.¹⁰⁵ The Court did not address whether plaintiffs must exhaust ERISA's administrative remedies prior to suing under section 502(a)(2).¹⁰⁶

B. Chief Justice Roberts's Concurrence

Chief Justice Roberts, joined by Justice Kennedy, argued that the majority may have erred in concluding that section 502(a)(2) was the proper source of the petitioner's claim.¹⁰⁷ While he agreed that the Fourth Circuit decision was incorrect, he argued that the petitioner's claim may be valid only under section 502(a)(1)(B),¹⁰⁸ characterizing the claim as dependent upon "the application and interpretation of the

99. *Id.*

100. *Id.* at 1025.

101. *Id.*

102. *Id.* at 1024.

103. *Id.* at 1025. This point is further confirmed by reviewing the effect that an opposite determination would have on the meaning of other ERISA sections. For instance, the Court points out that section 404(c), Pub. L. No. 95-406, 88 Stat. 829, 877-78 (1974) (codified as amended at 29 U.S.C. § 1104(c) (2006)), would have little meaning if fiduciaries only had liability to the plan as a whole and not to individual accounts. *LaRue*, 128 S. Ct. at 1025-26.

104. *LaRue*, 128 S. Ct. at 1026.

105. *Id.*

106. *Id.* at 1024 n.3.

107. *Id.* at 1026-27 (Roberts, C.J., concurring).

108. Pub. L. No. 93-406, § 502(a)(1)(B), 88 Stat. 829, 891 (1974) (codified as amended at 29 U.S.C. § 1132(a)(1)(B) (2006)).

plan terms.”¹⁰⁹ Chief Justice Roberts reasoned that because the claim may be brought under section 502(a)(1)(B), section 502(a)(2) may be impliedly precluded from providing relief because “appropriate” relief would be adequately provided under the former section.¹¹⁰

Chief Justice Roberts expressed concern that the majority opinion would allow plaintiffs to recast claims that should be brought under section 502(a)(1)(B), which contains several limitations, as section 502(a)(2) fiduciary breach claims.¹¹¹ According to Chief Justice Roberts, the effect of recasting such a claim is that a plaintiff may circumvent statutory hurdles that must be cleared before proceeding with a section 502(a)(1)(B) claim, such as exhausting the section 503¹¹² administrative process.¹¹³ He concluded that the Court could have closed this loophole by at least considering whether the claim was cognizable under section 502(a)(1)(B).¹¹⁴

C. Justice Thomas’s Concurrence

Justice Thomas, joined by Justice Scalia, also concurred.¹¹⁵ He wrote separately to express the opinion that the majority’s holding should not have been based on trends in retirement planning or legislative history; rather, the holding should have been supported by applying the text of the statutes to defined contribution plans.¹¹⁶ Justice Thomas reached this conclusion by first noting the repeated use of the word *plan* in section 409(a).¹¹⁷ He concluded that losses can be recovered only to the plan.¹¹⁸ Further, by using *any* to modify *losses*, Congress meant that recovery is available for all kinds of losses to the plan.¹¹⁹ Based on this assessment, Justice Thomas concluded that losses to the petitioner’s account caused by the fiduciary breach constituted losses to the plan.¹²⁰

109. *LaRue*, 128 S. Ct. at 1026 (Roberts, C.J., concurring).

110. *Id.*

111. *Id.* at 1027.

112. Pub. L. No. 93-406, § 503, 88 Stat. 829, 893 (1974) (codified at 29 U.S.C. § 1133 (2006)).

113. *LaRue*, 128 S. Ct. at 1027 (Roberts, C.J., concurring).

114. *Id.* at 1028.

115. *Id.* (Thomas, J., concurring).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1029.

The petitioner's individual account assets were plan assets allocated to individual accounts for the benefit of the respective participant.¹²¹ However, Justice Thomas opined that the allocation of these assets to individual accounts did not prevent them from also being assets of the plan.¹²² Thus, Justice Thomas stated that a defined contribution plan is the combination of assets attributable to individual accounts in the plan, held in trust by the fiduciary of the plan.¹²³ It follows that *any* loss to an individual account within a defined contribution plan would constitute a section 409(a) "loss[] to the plan."¹²⁴ Justice Thomas concluded that when a fiduciary breach causes diminution of a defined contribution plan participant's individual account assets, section 502(a)(2) permits the individual to recover those losses on behalf of the plan.¹²⁵ He further clarified that recovery should be paid directly to the plan, even though the funds may eventually be allocated to the participant's individual account.¹²⁶

V. IMPLICATIONS

A. *Majority Opinion*

*LaRue v. DeWolff, Boberg & Associates, Inc.*¹²⁷ clarifies that fiduciary breach claims alleging losses to only individual accounts, as opposed to alleging losses to the entire plan, may be brought pursuant to sections 409(a) and 502(a)(2).¹²⁸ However, the decision left several issues unresolved, therefore setting the stage for further confusion in the already complex area of ERISA practice, and possibly creating some unintended ramifications on the retirement planning landscape.

The majority failed to address whether recovery in these suits must be paid to the plan or if the recovery may be paid to the individual or subset of participants directly.¹²⁹ At first glance, this omission does not seem to make a difference because any recovery eventually makes its way to the individual, whether directly or through the plan to the participant's individual account. However, the absence of a limitation

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* n.*.

127. 128 S. Ct. 1020 (2008).

128. Pub. L. No. 93-406, §§ 409(a), 502(a)(2), 88 Stat. 829, 886, 891 (1974) (codified as amended at 29 U.S.C. §§ 1109(a), 1132(a)(2) (2006)); see *LaRue*, 128 S. Ct. at 1026.

129. See *LaRue*, 128 S. Ct. at 1022-26.

raises, among others, questions of how recovery should be taxed and whether the recovery is subject to early distribution penalties associated with some defined contribution plans.¹³⁰

Furthermore, the majority did not address whether section 502(a)(2) requires the plaintiff to exhaust section 503¹³¹ administrative safeguards prior to stating a valid claim.¹³² Leaving this question unanswered creates unpredictability. For instance, not wanting to chance the alternative, a prudent plaintiff may unnecessarily struggle through the administrative morass, causing further delay of recovery. On the other hand, a plaintiff may skip the administrative procedures, relying on the meaning of the statutory text, only to be undone by a court willing to accept the defendant's argument that section 502(a)(2) requires exhaustion of administrative remedies. In failing to address these issues when arguably presented, the Court has created a possible repeat of the situation that arose in the aftermath of *Massachusetts Mutual Life Insurance Co. v. Russell*,¹³³ ripe for confusion and splits in the lower courts.

LaRue appears to expose the fiduciaries or administrators of ERISA-regulated plans to increased liability.¹³⁴ However, the decision does not actually create new liabilities for the fiduciary as much as it brings into balance the liabilities of fiduciaries of defined contribution plans with those of defined benefit plans. In making the transition from a defined benefit to a defined contribution plan, an employer is able to assign much of its risks, such as funding risk, to the employee.¹³⁵ In return for shifting these risks to the employee, the employer, as the plan administrator, continues to owe the plan and participants a fiduciary duty.¹³⁶ Otherwise, the employer is able to offer an enticing benefit package for which the employer has little responsibility. By allowing fiduciary liability for breaches that harm only portions of the plan,

130. See, e.g., 26 U.S.C. § 72(t)(1)-(2) (2006) (imposing an additional ten percent tax on amounts that taxpayers receive from retirement accounts, such as 401(k) plans, prior to reaching age fifty-nine and one-half).

131. Pub. L. No. 93-406, § 503, 88 Stat. 829, 893 (1974) (codified at 29 U.S.C. § 1133 (2006)).

132. *LaRue*, 128 S. Ct. at 1024 n.3.

133. 473 U.S. 134 (1985).

134. See *LaRue*, 128 S. Ct. at 1022-26.

135. See Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 458 (2004).

136. See *id.* at 461-62. Funding risk speaks to the responsibility of ensuring that a plan will be funded with adequate assets at the time of retirement. *Id.* In defined benefit plans, the employer is responsible for proper funding, whereas, in defined contribution plans, the responsibility falls to the individual employee. *Id.*

LaRue ensures that employers maintain the same level of fiduciary responsibility to defined contribution plans as that previously given to defined benefit plans.

In settling the circuit split on this issue, the Court allows fiduciaries to plan for and prevent potential liability. Fiduciaries may limit liability in several ways. A fiduciary may write plan terms that operate to shift claims from fiduciary breach to another ERISA section,¹³⁷ to define clearly risks for the participant rather than the fiduciary,¹³⁸ and to simply exercise fiduciary duty with ordinary care and loyalty to the plan and participants. Of course, to the extent that *LaRue* is seen as increasing liability exposure for fiduciaries of defined contribution plans, employers may cut plan offerings or increase costs to participants by cutting employer contributions. However, a significant increase in plan costs or decrease in plan availability is unlikely given the ways in which employers and fiduciaries may limit ERISA liability. Moreover, a flood of litigation flowing from this decision is unlikely. These claims are often burdened with the uncertainty of succeeding on a difficult claim and whether attorney fees will be recovered, as well as the expense of experts necessary to prove actual loss. Thus, many fiduciary breach claims are financially unfeasible to pursue.¹³⁹

B. Chief Justice Roberts's Concurrence

Chief Justice Roberts's concurrence, while an effort to fully flesh out the issues in the case, may only create more unpredictability and confusion for ERISA litigants and lower courts. By characterizing *LaRue's* claim as a way to enforce participant rights that requires interpretation of the plan's terms and fits better under section 502(a)(1)-(B),¹⁴⁰ Chief Justice Roberts confuses the issue.¹⁴¹ The claim here may be better characterized as a fiduciary breach rather than an enforcement of rights because *LaRue's* instructions were ignored and there is no alternative remedy that would restore the losses caused by this breach.¹⁴² In a case like this, the plaintiff is not adequately and appropriately remedied under section 502(a)(1)(B) simply by enforcing

137. See 29 U.S.C. § 1132(a)(1)(B) (2006).

138. See Zelinsky, *supra* note 135, at 458-69.

139. See Consent Order of Dismissal at 1, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, No. 2:04-1747-DCN (D.S.C. Oct. 21, 2008). *LaRue* voluntarily dismissed his case because the expenses of continuing the lawsuit outweighed any possible recovery. *Id.*

140. Pub. L. No. 93-406, § 502(a)(1)(B), 88 Stat. 829, 891 (1974) (codified as amended at 29 U.S.C. § 1121(a)(1)(B) (2006)).

141. See *LaRue*, 128 S. Ct. at 1026 (Roberts, C.J., concurring).

142. See *id.* at 1022-23.

his right to make the investment change because this does not restore to the plan the loss that has already accrued. Instead, section 502(a)(2) provides the appropriate remedy for such a claim by restoring to the plan losses suffered by the participant's account that resulted from the breach. Thus, Chief Justice Roberts's characterization of the issue may persuade lower courts to heed his warning for recast claims,¹⁴³ causing those courts to improperly characterize a true section 502(a)(2) claim as a section 502(a)(1)(B) claim.

Likewise, many plaintiffs may rely on Chief Justice Roberts's warning as a sign that they must exhaust section 503 administrative remedies when bringing a section 502(a)(2) claim, in fear that the court may improperly characterize the claim as arising under section 502(a)(1)(B). Combined with the majority's failure to address whether a section 502(a)(2) claim actually must exhaust these administrative remedies, this suggestion means that many plaintiffs will suffer needless, and often costly, delays in filing proper section 502(a)(2) suits.

C. Justice Thomas's Concurrence

Justice Thomas's concurrence is noteworthy in two respects. First, his textual interpretation of the statutes at issue was less strained than the majority's interpretation. His reliance on the "unambiguous text" to reach his conclusion, as opposed to relying on tenuous interpretations of legislative history or changes in retirement funding mechanics, provides stronger support for future section 502(a)(2) claims and proper extensions of participant oversight under ERISA.¹⁴⁴

Justice Thomas also appropriately addressed the issue of recovery, on which the majority was silent.¹⁴⁵ Justice Thomas clarified that recovery should be paid only to the plan under section 502(a)(2).¹⁴⁶ Lower courts should take note of Justice Thomas's instruction when determining appropriate remedies under section 502(a)(2) and *LaRue*. Otherwise, there is a strong possibility that the purpose of this section—protecting the integrity of the plan—may be lost in interpretation.¹⁴⁷

JONATHAN JARRELL

143. See *supra* Part IV.B.

144. See *LaRue*, 128 S. Ct. at 1028 (Thomas, J., concurring).

145. See *id.* at 1020 (majority opinion).

146. *Id.* at 1029 n.* (Thomas, J., concurring).

147. See *id.* at 1020 (majority opinion).